APPENDIX

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 09-3872 & 09-3965

[Filed August 10, 2010]

CYNTHIA N. YOUNG, on behalf of herself and others similarly situated,

Plaintiff-Appellant / Cross-Appellee,

v.

VERIZON'S BELL ATLANTIC CASH BALANCE PLAN, et al.,

Defendants-Appellees / Cross-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division. No. 05 C 07314—
Morton Denlow, *Magistrate Judge.*

ARGUED JUNE 1, 2010—
DECIDED AUGUST 10, 2010

Before BAUER, FLAUM, and TINDER, *Circuit Judges*.

TINDER, *Circuit Judge*. "People make mistakes. Even administrators of ERISA plans." *Conkright v. Frommert*, 130 S. Ct. 1640, 1644 (2010). This introduction was fitting in *Conkright*, which dealt with a single honest mistake in the interpretation of an ERISA plan. It is perhaps an understatement in this case, which involves a devastating drafting error in the multi-billion-dollar plan administered by Verizon Communications, Inc. ("Verizon").

Verizon's pension plan contains erroneous language that, if enforced literally, would give Verizon pensioners like plaintiff Cynthia Young greater benefits than they expected. Young nonetheless seeks these additional benefits based on ERISA's strict rules for enforcing plan terms as written. Although Young raises some forceful arguments, we conclude that ERISA's rules are not so strict as to deny an employer equitable relief from the type of "scrivener's error" that occurred here. We will accordingly affirm the district court's judgment granting Verizon equitable reformation of its plan to correct the scrivener's error.

I. Background

A. Bell Atlantic's Pension Plans

Bell Atlantic, the predecessor of Verizon, operated the Bell Atlantic Management Pension Plan ("BAMPP") until 1996. The BAMPP expressed an employee's retirement benefit as a defined annuity, but employees also had the option of receiving a lump sum if they retired during specified "cashout windows." For certain employees who retired during the 1994-1995 cashout window, the BAMPP provided a lump sum equal to the "actuarial equivalent present value" of the employee's pension benefit, but calculated using an enhanced discount rate. Specifically, section 4.19 of the BAMPP required the use of a discount rate of "120% of the applicable . . . PBGC [Public Benefit Guarantee Corporation] interest rate in effect" at the time of severance.

In 1996, Bell Atlantic adopted the Bell Atlantic Cash Balance Plan to replace the BAMPP. The new Plan expressed an employee's benefit as a cash balance that grew steadily with the employee's age and years of service. Under the Cash Balance Plan, employees still had the option of receiving their retirement benefit as either an annuity or a lump sum.

Key to this transition to the Cash Balance Plan was converting the value of employees' benefits under the old BAMPP to cash balances under the new Plan. The Plan used "transition factors," a series of multipliers that increased with employees' age and years of service, to make the conversion. The Plan language describing this conversion is critical, so we reproduce it in some detail (the emphasis is ours):

16.5 Opening Balance

. . . .

16.5.1 Pension Conversions as of the Transition Date

Where a present value must be determined under this Section 16.4 [sic, should read "Section 16.5"], *the present value shall be determined as follows: (a) using the PBGC interest rates which were in effect for September of 1995* . . . .

16.5.1(a) 1995 Active Participants and 1995 Former Active Participants

. . . the opening balance of the Participant's Cash Balance Account on January 1, 1996 shall be the amount described in subsection (1) or (2) below, as applicable:

16.5.1(a)(1) If Eligible for Service Pension

. . . .

16.5.1(a)(2) Not Eligible for Service Pension

In the case of a Participant who is not eligible for a Service Pension under the 1995 BAMPP Plan as of the Transition Date, the amount described in this paragraph (2) is *the product of multiplying* (A) *the Participant's applicable Transition Factor described in Table 1 of this Section, times* (B) *the lump-sum cashout value of the Accrued Benefit*

> *payable at age 65 under the 1995 BAMPP Plan*, determined as if the Participant had a Severance From Service Date on December 31, 1995, based on Compensation paid through December 31, 1995, *multiplied by the applicable transition factor described in Table 1 of this Section*. . . .

B. Young's Administrative Claim

Cynthia Young worked for Bell Atlantic from 1965 to 1997. When the Cash Balance Plan took effect in 1996, Young was not eligible for a service pension under the BAMPP—that is, her age and service level did not qualify her for full retirement benefits—so her opening cash balance was calculated using § 16.5.1(a)(2), for a resulting balance of $240,127. By the time Young retired in 1997, her cash balance had grown to the point that she received a lump-sum benefit of $286,095.

Several years later, in 2004, Young filed a claim with the Claims Review Unit of Verizon (which by then had taken over Plan administration as Bell Atlantic's successor). Young claimed that Bell Atlantic made two errors in calculating her opening cash balance, and hence her ultimate pension benefit, under the Cash Balance Plan. First, Young read the language of § 16.5.1(a)(2) to require that the "applicable transition factor" be multiplied twice to convert her lump-sum cashout under the BAMPP to her opening cash balance under the new Plan. Bell Atlantic, however, multiplied the transition factor only once when making the conversion. Second, Young claimed that Bell Atlantic improperly applied the 120% PBGC discount rate used in the 1995 BAMPP to determine the "lump-sum

cashout value" under § 16.5.1(a)(2). Young contended that Bell Atlantic should have used a discount rate of simply 100% of the PBGC rate.

Verizon's Claims Review Unit denied Young's claims, and on appeal, Verizon's Claims Review Committee affirmed. The Committee concluded that the intended meaning of § 16.5.1(a)(2) was to use only a single transition factor to calculate opening cash balances; the section's second reference to the "applicable transition factor" was a drafting mistake. As for Young's discount rate claim, the Committee concluded that § 16.5.1(a)(2) incorporated the 120% PBGC rate used in the 1995 BAMPP by referring to "the lump-sum cashout value . . . under the 1995 BAMPP Plan."

C. Young's Federal Court Class Action

In 2005, Young brought a federal court action under ERISA § 502(a), 29 U.S.C. § 1132(a), against Verizon and its Cash Balance Plan (collectively "Verizon"). Young asserted the same claims she raised in Verizon's administrative process, arguing that Verizon improperly applied only a single transition factor and the 120% PBGC discount rate to calculate her opening cash balance. The parties agreed to treat the case as a class action, and the district court certified a class of some 14,000 Bell Atlantic/Verizon pensioners similarly situated to Young.

Young's class action presented the district court, acting through Magistrate Judge Denlow, with a challenge. The court was confronted with a convoluted ERISA plan that seemed to contain a costly drafting error, but an uncertain state of law on the scope of the

court's review of such an error. So the court decided to bifurcate the trial into two phases and apply alternative standards of review. In the first phase, the court assumed that it was limited to examining the administrative record and reviewing the Verizon Review Committee's denial of benefits under a deferential standard. (The Cash Balance Plan granted Verizon, as plan administrator, broad discretion to interpret the Plan, so judicial review was constrained to an "arbitrary and capricious" standard. *Black v. Long Term Disability Ins.*, 582 F.3d 738, 743-44 (7th Cir. 2009).) Under this standard, the district court upheld the Committee's denial of Young's discount rate claim. Conversely, on Young's transition factor claim, the court concluded that the Committee abused its discretion in unilaterally disregarding the second reference to the transition factor in § 16.5.1(a)(2) as a drafting mistake. If Verizon wished to avoid that mistake, it would have to seek a court order for equitable reformation of the Plan.

Taking the district court's cue, Verizon counterclaimed for equitable reformation of the Plan to remove the second transition factor in § 16.5.1(a)(2) as a "scrivener's error." The court took up Verizon's counterclaim in the second phase of the trial, in which the court conducted a de novo review of the Plan and allowed the parties to introduce extrinsic evidence on the intended meaning of § 16.5.1(a)(2). And that evidence overwhelmingly showed that the inclusion of the second transition factor was indeed a scrivener's error.

The drafting history of the 1996 Plan revealed how the second, erroneous transition factor came to be. Six drafts of the Plan were prepared prior to the final

version. The first three drafts were prepared by Mercer Human Resources Consulting, an outside firm hired by Bell Atlantic, and contained no mention of a second transition factor. It was not until one of Bell Atlantic's in-house attorneys, Barry Peters, took over drafting responsibility that the second transition factor appeared. In working on the fourth draft, Peters restructured the conversion formula under § 16.5.1(a)(2) into a more readable "A times B" format, but in doing so, neglected to delete a trailing clause from the previous draft that referred to "the applicable Transition Factor." Testifying in the district court, Peters admitted that he made this mistake in failing to delete the trailing clause in § 16.5.1(a)(2), thereby duplicating the transition factor. Peters's mistake survived unnoticed in the fifth, sixth, and final drafts of the Plan.

In addition to the drafting history, the correspondence between Bell Atlantic and plan participants showed an expectation that only a single transition factor would be used to calculate opening cash balances. In October 1995, Bell Atlantic sent participants a brochure entitled, "Introducing Your Cash Balance Plan," which clearly depicted opening cash balances as the product of an employee's lump-sum value under the 1995 BAMPP and a single transition factor. In November 1995, Bell Atlantic sent participants personalized statements of their estimated opening account balances, which also illustrated the use of a single transition factor. Following the implementation of the Plan, Bell Atlantic sent participants personalized statements of their actual opening balances, and thereafter quarterly cash balance statements, which, again, reflected the use of only one transition factor. Notably, though,

these Plan-related communications contained "plan trumps" provisions cautioning that, in the event of discrepancies between those communications and the Plan, the Plan would govern.

Also convincing was the course of dealing between Bell Atlantic/Verizon and plan participants. Bell Atlantic consistently calculated opening cash balances using a single transition factor and paid benefits accordingly. Taking Young's case as an example, her transition factor was 2.659. The estimated opening balance statement that Young received illustrated the multiplication of this 2.659 transition factor by her BAMPP lump-sum cashout value of $90,027, for an estimated opening balance of $90,027 × 2.659 = $239,381. The actual opening balance statement that Young received in 1996 applied the same, single-transition-factor formula to slightly different numbers: $90,307 × 2.659 = $240,127. Prior to Young's lawsuit, no employee complained that opening balances should have been increased by an additional transition factor. For her part, Young admitted that she never relied on the transition factor language in § 16.5.1(a)(2) prior to this litigation.

Based on this evidence of the intended meaning of the Plan, the district court found that the second transition factor in § 16.5.1(a)(2) was a scrivener's error and granted Verizon's counterclaim for equitable reformation. The court also resolved a host of other arguments raised by the parties, many of which we discuss below. But suffice it to say, the district court's treatment of the issues presented by this case was exhaustive. Over the course of a four-year, multi-phase litigation, the court built a complete record, fully explored alternative bases of decision, and sharply

honed the issues for appellate review. These commendable efforts by the district court, as well as the fine advocacy by both sides, have greatly assisted this court in deciding this complex ERISA case.

II. Analysis

A. Statute of Limitations

Before reaching the merits, we must address each side's argument that the other's claims are barred by the statute of limitations. ERISA does not provide a limitations period for actions brought under § 502, 29 U.S.C. § 1132, so we borrow the most analogous statute of limitations from state law. *Berger v. AXA Network LLC*, 459 F.3d 804, 808 (7th Cir. 2006). We do not automatically borrow the forum state's limitations period; if another state has a significant connection to the dispute and its limitations period is more consistent with federal ERISA policies, that state's limitations period should apply. *Id.* at 813. For actions such as this one to enforce ERISA plans under § 502(a), we have previously borrowed state limitations periods for suits on written contracts. *Leister v. Dovetail, Inc.*, 546 F.3d 875, 880-81 (7th Cir. 2008); *Daill v. Sheet Metal Workers' Local 73 Pension Fund*, 100 F.3d 62, 65 (7th Cir. 1996).

The parties agree that Pennsylvania's four-year statute of limitations for breach of contract actions, 42 Pa. Cons. Stat. § 5525, should apply to this ERISA case. Pennsylvania has the most significant connection to this dispute, since Bell Atlantic was headquartered and drafted the Cash Balance Plan there. Also, more class members currently live in Pennsylvania than any other state, and while a few class members live in the

forum state of Illinois, Young has never lived or worked there. We further note that the Plan contains a choice of law provision stating that Pennsylvania law will fill any gaps left by federal ERISA law. *See Berger*, 459 F.3d at 813-14 (considering choice of law clause as a non-controlling but relevant factor in selecting a limitations period).

The real point of contention is the accrual date of the parties' claims, that is, when Pennsylvania's four-year limitations period started to run. Although federal courts borrow state limitations periods for certain ERISA claims, the accrual of those claims is governed by federal common law. *Daill*, 100 F.3d at 65.

Beginning with Young's ERISA claim, we have held that a claim to recover benefits under § 502(a) accrues "upon a clear and unequivocal repudiation of rights under the pension plan which has been made known to the beneficiary." *Id.* at 66. In this case, Young did not receive a clear repudiation of her claim for additional benefits until 2005, when Verizon's Review Committee resolved her administrative appeal. (Actually, the Committee denied Young's claim with respect to the discount rate issue in 2005 but took until 2007 to deny her claim with respect to the transition factor issue. Since it is obvious that Young's entire federal court action, filed in 2005, would be timely using a 2005 accrual date, this distinction is immaterial.) Prior to denying Young's administrative claim, Verizon did not inform Young that it rejected her interpretation of the Plan calling for two transition factors and a 100% PBGC discount rate. *Cf. id.* at 66 (claim accrued upon correspondence from plan disagreeing with participant's understanding of benefits).

Verizon argues that Young's claim accrued in February 1998, when she received her lump-sum benefit computed under Verizon's interpretation of the Cash Balance Plan. At that time, however, the parties' dispute over the correct interpretation of the Plan had not developed. And nothing suggests that the $286,095 payment that Young received should have been a red flag that she was underpaid. *Cf. Redmon v. Sud-Chemie Inc. Ret. Plan for Union Employees*, 547 F.3d 531, 539 (6th Cir. 2008) (finding a clear repudiation when the plan stopped making payments entirely, but not earlier when the payment amount was merely inconsistent with the plaintiff's understanding of benefits). The 1998 payment that Young received was not so inconsistent with her current claim for additional benefits as to serve as a clear repudiation.

Moving to Verizon's counterclaim, Seventh Circuit precedent provides less guidance on the accrual of a claim for equitable reformation under ERISA § 502(a)—understandably so, since the cognizance of such a claim is an issue of first impression for this court. The general federal common law rule is that an ERISA claim accrues when the plaintiff knows or should know of conduct that interferes with the plaintiff's ERISA rights. *See Berger*, 459 F.3d at 815-16 (accrual when beneficiaries learned of change in employer's method for determining benefit eligibility); *Teumer v. Gen. Motors Corp.*, 34 F.3d 542, 550 (7th Cir. 1994) ("Once an unlawful action is taken, a claim accrues when the putative plaintiff discovers the *injury* that results."). Applying this rule to Verizon's reformation action, we consider when Verizon should have known that the scrivener's error in the Cash Balance Plan, if left unreformed, would impede its rights under the Plan.

The district court found, and Verizon does not dispute, that Verizon's predecessor Bell Atlantic learned of the scrivener's error in 1997. Indeed, Bell Atlantic removed the second, erroneous transition factor from the 1998 plan that it adopted to replace the 1997 version of the Cash Balance Plan. Still, we conclude that this 1997 discovery did not give Verizon notice of the need to reform the scrivener's error, given a course of dealing consistent with Verizon's interpretation of the Plan.

Verizon always treated the Plan's second transition factor as a drafting mistake, and through correspondence with plan participants, it communicated that only a single transition factor would be used to calculate opening cash balances. Verizon consistently paid benefits using this formula, and prior to Young's administrative claim, no employee communicated a contrary understanding that Plan benefits should be calculated using two transition factors. *Cf. Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1141 (7th Cir. 1992) (employee's ERISA unlawful discharge claim accrued when employer communicated discharge decision); *Bowes v. Travelers Ins. Co.*, 173 F. Supp. 2d 342, 346 (E.D. Pa. 2001) (applying Pennsylvania law, claim for reformation of written contract accrued when conflicting oral statements underlying the dispute were made). Under these circumstances, although Verizon discovered the drafting mistake in 1997, it did not then know that this mistake would give rise to a controversy requiring it to raise an equitable reformation claim. *See Int'l Union v. Murata Erie N. Am., Inc.*, 980 F.2d 889, 901 (3d Cir. 1992) (ERISA claim did not accrue when plan sponsor amended plan absent evidence that participants knew of any potential controversy over

amended language). Instead, it was not before Young put the transition factor language at issue in her 2005 federal court action that Verizon's counterclaim for equitable reformation accrued.

None of the parties' claims accrued before 2005 when Young brought her federal court ERISA action, so these claims are timely under the applicable Pennsylvania four-year limitations period. We may proceed to the merits of Verizon's claim for equitable reformation and Young's claim for additional benefits under ERISA § 502(a).

B. Equitable Reformation Due to Scrivener's Error

ERISA is a comprehensive statute designed to uniformly regulate employee benefit plans. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). To achieve uniformity, ERISA contains numerous requirements for adopting and administering plans. Plans must be "established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). The plan terms must be communicated to participants through an easily understood "summary plan description," as well as a "summary of any material modification" to the plan. *Id.* § 1022(a). These ERISA required writings are given primary effect and strictly enforced, and plan administrators must adhere to "the bright-line requirement to follow plan documents in distributing benefits." *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 876 (2009).

While ERISA's strict requirements "ensure[ ] fair and prompt enforcement of rights under a plan," Congress was careful not to make those requirements

so onerous "that administrative costs, or litigation expenses, unduly discourage employers from offering plans in the first place." *Conkright v. Frommert*, 130 S. Ct. 1640, 1649 (2010) (quotations omitted). So ERISA also allows some flexibility in plan administration and enforcement to achieve fair, equitable results. In particular, employers may grant plan administrators broad discretion in interpreting plan terms. *Id.* "Deference promotes efficiency by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation." *Id.*

Another ERISA provision that promotes equitable plan enforcement—and the statute important here—is § 502(a)(3), which allows a plan participant, beneficiary, or fiduciary to bring a civil action for "appropriate equitable relief." 29 U.S.C. § 1132(a)(3)(B). The Supreme Court has explained that the statute authorizes "those categories of relief that were *typically* available in equity" during the days when common law courts were divided as courts of law or of equity. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993); *see also Kenseth v. Dean Health Plan, Inc.*, No. 08-3219, 2010 WL 2557767, at *24 (7th Cir. June 28, 2010) (describing categories of equitable relief available under 29 U.S.C. § 1132(a)(3)). The issue in this case, then, is whether Verizon's claim for equitable reformation of its Cash Balance Plan is the type of equitable relief authorized by § 502(a)(3).

We have never considered whether § 502(a)(3) authorizes equitable reformation of an ERISA plan due to a scrivener's error, but our case law addressing the related problem of ambiguous plan language suggests that such relief may be appropriate.

In *Mathews v. Sears Pension Plan*, 144 F.3d 461 (7th Cir. 1998), we put the parties' reasonable expectations ahead of the literal text of an ERISA plan. Although the plain language of the plan suggested a benefits formula more favorable to employees, the employer offered objective, extrinsic evidence showing an "extrinsic ambiguity" in this language. *Id.* at 466-67. The summary plan documents and the parties' course of dealing were consistent with the employer's reading of the plan, so we declined to adopt the employees' contrary reading under "rigid and archaic" rules of contract interpretation. *Id.* at 469.

We reached a different result in *Grun v. Pneumo Abex Corp.*, 163 F.3d 411, 420-21 (7th Cir. 1998), refusing to set aside unambiguous plan language based on an employer's claim of "mutual mistake." Still, we acknowledged that such relief would be available in "the rare case where literal application of a text would lead to absurd results or thwart the obvious intentions of its drafters." *Id.* at 420 (quotation omitted). Reformation was inappropriate in *Grun* because the employee relied on the literal plan language to predict his right to severance compensation. *Id.* at 421; *cf. Mathews*, 144 F.3d at 469 (noting absence of claim that any beneficiary actually relied on plan language).

Other circuits have directly addressed claims for equitable reformation of an ERISA plan. Using reasoning similar to that in *Mathews* and *Grun*, these courts have either concluded that ERISA authorizes such relief or does not foreclose the possibility.

Verizon's strongest case is *Int'l Union v. Murata Erie N. Am., Inc.*, 980 F.2d 889, 907 (3d Cir. 1992), in

which the Third Circuit recognized an employer's § 502(a)(3) claim to correct a "scrivener's error" in a plan provision on the distribution of excess funds. The court found equitable reformation appropriate because holding the employer to the scrivener's error would produce "what is admittedly a 'windfall' "—"an excess remaining in the Plans" that the plaintiffs could not have reasonably expected. *Id.* The Eighth Circuit applied a similar rationale in *Wilson v. Moog Auto., Inc. Pension Plan*, 193 F.3d 1004, 1008-10 (8th Cir. 1999), to conclude that an ERISA plan's failure to provide a minimum age for retirement benefits was a reformable mistake. Reformation was possible because extrinsic evidence showed that none of the plaintiffs actually relied on the erroneous plan language or believed that they would be eligible for early retirement. *Id.* at 1009-10.

The Ninth Circuit distinguished *Murata* in *Cinelli v. Sec. Pac. Corp.*, 61 F.3d 1437, 1444-45 (9th Cir. 1995), rejecting an employee's claim that the absence of a plan provision entitling him to vested life insurance benefits was a mistake. Although reformation of a scrivener's error was appropriate in *Murata* to avoid a "windfall" and uphold employees' reasonable expectations of benefits, those factors were lacking in *Cinelli*. *Id.* at 1445. Likewise, in *Blackshear v. Reliance Standard Life Ins. Co.*, 509 F.3d 634, 643-44 (4th Cir. 2007), *abrogated on other grounds as stated in Williams v. Metro. Life Ins. Co.*, Nos. 09-1025 & 09- 1568, 2010 WL 2599676, at *5 (4th Cir. June 30, 2010), the Fourth Circuit declined to equitably reform an ERISA plan under the circumstances, where the plan language was clear and neither the summary plan description nor other plan documents supported the employer's claim of a scrivener's error.

From this authority, we conclude that ERISA § 502(a)(3) authorizes equitable reformation of a plan that is shown, by clear and convincing evidence, to contain a scrivener's error that does not reflect participants' reasonable expectations of benefits. Though complex in design, ERISA maintains the basic goal of "protecting employees' justified expectations of receiving the benefits their employers promise them." *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004). It would thwart this goal to enforce erroneous plan terms contrary to those expectations, even if doing so would increase employees' benefits. The "appropriate equitable relief" authorized by § 502(a)(3) allows a court to reform an ERISA plan to avoid such an unfair result. *See Cent. Pa. Teamsters Pension Fund v. McCormick Dray Line, Inc.*, 85 F.3d 1098, 1105 n.2 (3d Cir. 1996) ("[I]n circumstances where a court can establish that no plan participants were likely to have relied upon the scrivener's error in question . . . allowing reformation of the scrivener's error does not thwart ERISA's statutory purpose . . . ."); *Murata*, 980 F.2d at 907 ("[T]he alleged error relates to what is admittedly a 'windfall' . . . that neither side could have reasonably expected."); *cf. Mathews*, 144 F.3d at 469 ("We cannot see how ERISA beneficiaries or anyone else . . . would be benefited by the adoption of principles of contractual interpretation so rigid and archaic as to permit the class to reap the pure windfall here sought to the potential prejudice of other beneficiaries.").

We acknowledge, like the Third Circuit in *Murata*, 980 F.2d at 907, that equitable reformation of an ERISA plan creates some tension with the "written instrument" requirement of 29 U.S.C. § 1102(a)(1), also known as the "plan documents rule," *Kennedy*,

129 S. Ct. at 877. This rule ensures "that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan," *Murata*, 980 F.2d at 907, without complicated "enquiries into nice expressions of intent" behind plan language, *Kennedy*, 129 S. Ct. at 875. Young cautions that allowing equitable reformation of ERISA plans will undermine the efficient, easily enforceable plan documents rule and encourage protracted, discovery-intensive litigation over the intended meaning of a plan.

Even so, since we interpret § 502(a)(3) to authorize the equitable reformation claim asserted here, we cannot simply reject such a claim based on the added litigation burden that it might represent. Moreover, we see little difference between the intent-based inquiry that took place in this reformation case and what must occur in the related case of an ambiguous ERISA plan. In each case, the court must look beyond the plan document to extrinsic evidence to determine the parties' understanding of the plan. *See Mathews*, 144 F.3d at 467. We do not think that the availability or scope of this judicial inquiry should turn on whether the error in an ERISA plan is deemed an "ambiguity" or a "scrivener's error." Drafting mistakes in ERISA plans may take many forms; some involve language that is ambiguous on its face while others, like the mistake here, involve language that is not intrinsically ambiguous but still misstates participants' benefits. It would not further the purposes of ERISA to allow courts to correct one type of mistake but not the other.

Also, other limitations on the equitable reformation claim that we recognize under § 502(a)(3) will mitigate its impact on the plan documents rule. Only those who

can marshal "clear and convincing" evidence that plan language is contrary to the parties' expectations will have a viable claim. *Murata*, 980 F.2d at 908. This standard of proof is rigorous, requiring evidence that is "clear, precise, convincing and of the most satisfactory character that a mistake has occurred and that the mistake does not reflect the intent of the parties." *Id.* at 907 (quotation omitted); *accord Blackshear*, 509 F.3d at 642. The evidence also must be "objective" and not dependent "on the credibility of testimony (oral or written) of an interested party." *Mathews*, 144 F.3d at 467. These high standards of proof should deter an employer from seeking to reform plan language simply because it has proven unfavorable.

In this case, though, we agree with the district court that Verizon presented enough objective, convincing evidence to show that the second reference to the transition factor in § 16.5.1(a)(2) of the Cash Balance Plan was a scrivener's error inconsistent with participants' expected benefits.

The drafting history left little doubt that the second transition factor in § 16.5.1(a)(2) was a mistake. It first appeared in the fourth draft of the Plan, the first draft prepared by Bell Atlantic attorney Barry Peters. This draft reformatted the multiplication formula in § 16.5.1(a)(2), but in doing so, failed to omit the prior draft's trailing clause that referred to the transition factor, thereby duplicating the transition factor. We need not rely on Peters's arguably self-serving testimony to conclude that this botched reformatting led to the second transition factor; so much is clear by comparing the fourth draft with the prior version. And given the absence of any evidence contemporaneous to

the fourth draft suggesting that Bell Atlantic was reworking the Plan to increase benefits, it is evident that duplicating the transition factor was a drafting mistake.

The communications and course of dealing between Bell Atlantic/Verizon and plan participants further illustrate that the parties intended a single-transition-factor formula. Young and other participants received a Plan brochure that described their opening cash balances as the product of their lump-sum values under the 1995 BAMPP and a single transition factor. Although the brochure did not explicitly state that a "single" transition factor would be used, the formula depicted in the brochure makes clear that only one multiplier would apply. That was confirmed in the personalized statements sent to participants of their estimated and actual opening cash balances, which reported values based on the use of a single transition factor. By way of illustration, Young received an estimated opening balance statement that reported her transition factor of 2.659 and her BAMPP lump-sum cashout value of $90,027, for an estimated opening balance of $239,381. Her actual opening balance reported in a later statement, $240,127, was calculated similarly. If a second 2.659 transition factor were applied to these figures, Young's estimated and actual opening balances would have been $636,514 and $638,498, respectively. Bell Atlantic/Verizon never squared transition factors in this manner but instead calculated benefits using only a single transition factor, consistent with the Plan communications. Prior to Young's claim, no employee complained that cash balances should have been increased by an additional transition factor.

Granted, many of the Plan communications, including the Plan brochure and opening balance statements, are less compelling because they contain what Young describes as "plan trumps" provisions, which stated that the communications were subordinate to any contrary language in the Plan. As Young points out, were the situation reversed and the employee-favorable language contained in a Plan communication rather than the Plan itself, Verizon no doubt would contend that these plan trumps provisions barred Young from relying on the communication. *See Kolentus v. Avco Corp.*, 798 F.2d 949, 958 (7th Cir. 1986) ("[W]hen the summary booklet expressly states that it is merely an outline of the pension plan and that the formal text of the plan governs in the event a question arises, the plaintiffs cannot rely on the general statements of the booklet but must look to the plan itself."). Young's point is well-taken, but we cannot agree that the mere existence of plan trumps provisions precludes Verizon from reforming the Plan consistent with Plan communications. At issue is whether Verizon has established by clear and convincing evidence that the intended meaning of § 16.5.1(a)(2) was to apply only a single transition factor to calculate opening cash balances. Verizon may include all the Plan communications describing a single-transition-factor formula as part of that evidence, even though they contain plan trumps provisions.

Based on this evidence of the intended meaning of the Plan, the district court correctly found that the second transition factor in § 16.5.1(a)(2) was a scrivener's error inconsistent with plan participants' expected benefits. Under these circumstances,

equitable reformation of the Plan to remove the error is appropriate.

We close our discussion of Verizon's reformation claim by considering additional defenses to equitable relief. Because Verizon's claim is one for "appropriate equitable relief" under ERISA § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B), it is subject to the traditional equitable defenses at common law, provided that they are not inconsistent with ERISA.

Young raises the defense of "good faith" and "fair dealing," under which a contracting party may be precluded from reforming a mistake caused by the party's own "gross" negligence. Restatement (Second) of Contracts § 157 & cmt. a (1981). As the district court put it, Bell Atlantic/Verizon's failure to prevent the drafting mistake in § 16.5.1(a)(2) was "profound" negligence. Bell Atlantic charged a single in-house attorney, Barry Peters, with revising a critical provision of a multi-billion-dollar pension plan, apparently without critical review by another ERISA expert. It is baffling that a major corporation would not invest greater resources to ensure accuracy in the drafting of such an important document. Still, we cannot agree with Young that this institutional failure showed a lack of good faith. Verizon never misrepresented its intended meaning of the Cash Balance Plan, and indeed, based on the extrinsic evidence examined above, it made great efforts to accurately communicate how participants' benefits would be calculated. *Cf. id.* cmt. a, illustration 2 (misrepresentation that party verified bid for accuracy was failure to act in good faith).

For similar reasons, we do not accept Young's "unclean hands" defense, under which "equitable relief will be refused if it would give the plaintiff a wrongful gain." *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1021 (7th Cir. 2002). A plaintiff who acts unfairly, deceitfully, or in bad faith may not through equity seek to gain from that transgression. *See Packers Trading Co. v. Commodity Futures Trading Comm'n*, 972 F.2d 144, 148-49 (7th Cir. 1992). Verizon made a mistake, and a big one at that, in drafting the Cash Balance Plan, but Verizon did not attempt to deceive plan participants regarding their benefit rights under the intended meaning of § 16.5.1(a)(2). *Cf. id.* (barring relief for a plaintiff who concealed his knowledge of the defendant's mistake and then attempted to recover based on that mistake). On the contrary, Verizon's Plan administration and communications reflected its consistent view that opening cash balances would be calculated using only a single transition factor.

Finally, Young raises the equitable defense of laches, or unreasonable delay, by Verizon in seeking equitable reformation. Laches means "culpable delay in suing" and may apply if the plaintiff commits an unreasonable, prejudicial delay in bringing the suit. *Teamsters & Employers Welfare Trust of Ill. v. Gorman Bros. Ready Mix*, 283 F.3d 877, 880 (7th Cir. 2002). For reasons explained above in our discussion of the statute of limitations, Verizon did not unreasonably delay in bringing its equitable reformation claim. Although Verizon learned of the scrivener's error in the Cash Balance Plan in 1997, at that time it had no reason to believe that this error would lead to a benefits dispute. Instead, the parties' correspondence and course of dealing were consistent with Verizon's understanding that only a single transition factor

would be used to calculate benefits. By 1998, Verizon had corrected the Plan to reflect this understanding, and no employee communicated a contrary interpretation before Young brought her administrative claim in 2004. Since this course of conduct reinforced Verizon's interpretation of the Cash Balance Plan, Verizon did not "sleep on [its] rights," *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 820 (7th Cir. 1999), by not bringing an equitable reformation claim before Young's lawsuit.

In sum, no equitable defenses bar Verizon's equitable reformation claim under ERISA § 502(a)(3), and the district court properly granted that claim to remove the scrivener's error from the Cash Balance Plan.

C. Discount Rate for Opening Cash Balances

In addition to her argument regarding the second transition factor in § 16.5.1(a)(2), Young claimed that Verizon improperly applied the enhanced, 120% PBGC discount rate used in the 1995 BAMPP to calculate her opening balance under the Cash Balance Plan. Verizon's Review Committee denied Young's discount rate claim, and because the Plan grants the administrator broad discretion to interpret Plan provisions, we review the Committee's decision for an abuse of discretion. *See Black v. Long Term Disability Ins.*, 582 F.3d 738, 744 (7th Cir. 2009).

The interpretation of ERISA plans is governed by federal common law, which draws on general principles of contract interpretation to the extent they are consistent with ERISA. *Mathews*, 144 F.3d at 465. Under these principles, contract language is given its

plain and ordinary meaning. *Pitcher v. Principal Mut. Life Ins. Co.*, 93 F.3d 407, 411 (7th Cir. 1996). Contracts must be read as a whole, and the meaning of separate provisions should be considered in light of one another and the context of the entire agreement. *Taracorp, Inc. v. NL Indus., Inc.*, 73 F.3d 738, 745 (7th Cir. 1996). Contract interpretations should, to the extent possible, give effect to all language without rendering any term superfluous, *id.* at 746, but if both a general and a specific provision apply to the subject at hand, the specific provision controls, *Medcom Holding Co. v. Baxter Travenol Labs., Inc.*, 984 F.2d 223, 227 (7th Cir. 1993).

The use of a discount rate to calculate opening balances under the Cash Balance Plan occurs by operation of § 16.5.1(a)(2). That section defines opening cash balances as the product of two variables (assuming, of course, one ignores the second "transition factor" that we have disregarded as a scrivener's error): "(A) the Participant's applicable Transition Factor described in Table 1 of this Section, *times* (B) the lump-sum cashout value of the Accrued Benefit payable at age 65 under the 1995 BAMPP Plan . . . ." Under § 4.19 of the BAMPP, which was attached to the Cash Balance Plan as an appendix, lump-sum payments for employees who retired during the 1994-1995 cashout window were calculated using a discount rate of 120% of "the applicable PBGC interest rate."

Reading the language of § 16.5.1(a)(2) in the context of the entire Cash Balance Plan—including the attached 1995 BAMPP—the best interpretation is one that applies the 120% PBGC discount rate used in the 1995 BAMPP to calculate opening cash balances. The plain meaning of the "(B)" variable in

§ 16.5.1(a)(2)—"the lump-sum cashout value . . . payable . . . under the 1995 BAMPP Plan"—is the lump-sum value *as calculated* under the 1995 BAMPP. Since the BAMPP used a 120% PBGC discount rate, that same methodology carries over to calculating opening balances under the Cash Balance Plan.

Young points to the umbrella section 16.5.1, which provides that any "present value" that "must be determined under this Section 16.[5] shall be determined . . . using the PBGC interest rates which were in effect for September of 1995." Young would apply this present value definition, which uses a discount rate of simply 100% of the PBGC rate, to determine the "lump-sum cashout value" in § 16.5.1(a)(2). Young's interpretation ignores the explicit reference in § 16.5.1(a)(2) to the cashout value "under the 1995 BAMPP Plan." Because § 16.5.1(a)(2) specifically uses the 1995 BAMPP formula for discounting lump-sum values, the more general present value formula in § 16.5.1 does not apply to that section.

We also disagree with Young that incorporating the 1995 BAMPP, 120% PBGC formula into § 16.5.1(a)(2) in this manner renders the 100% PBGC formula in § 16.5.1 superfluous. The latter formula applies broadly to calculate present values under "this Section 16.[5]." Notably, unlike § 16.5.1(a), provisions in § 16.5.2(a) use the "present value" term defined in § 16.5.1 to determine opening cash balances for employees covered by those sections. So it harmonizes all the language in § 16.5 to give effect to the 120% PBGC rate incorporated into § 16.5.1(a)(2) for that specific provision, while giving effect to the general 100% PBGC rate for other provisions in § 16.5.

The most reasonable reading of § 16.5.1(a)(2) is one that applies the 120% PBGC discount rate to calculate opening cash balances. At the very least, Verizon's Review Committee did not abuse its discretion in adopting this interpretation.

III. Conclusion

ERISA's rules for written plans are strictly enforced, but they are not so strict as to prevent equitable reformation of a plan that is shown, by clear and convincing evidence, to contain a scrivener's error that is inconsistent with participants' expected benefits.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 05 C 7314
Magistrate Judge Morton Denlow

[Filed November 2, 2009]

CYNTHIA N. YOUNG, on behalf of herself, and others similarly situated,

Plaintiff,

v.

VERIZON'S BELL ATLANTIC CASH BALANCE PLAN, formerly known as Bell Atlantic Cash Balance Plan, formerly known as Bell Atlantic Management Pension Plan, and VERIZON COMMUNICATIONS, INC., as successor in interest to Bell Atlantic Corporation,

Defendants.

MEMORANDUM OPINION AND ORDER

This ERISA class action presents the issue of whether a billion dollar scrivener's error should be

reformed or enforced as written. Plaintiff Cynthia N. Young ("Plaintiff" or "Young") alleges that Defendants Verizon's Bell Atlantic Cash Balance Plan (the "Plan") and Verizon Communications, Inc. ("Verizon") (collectively "Defendants") improperly calculated her pension benefits, and those of similarly situated employees. Plaintiff seeks judicial review of the final decision of the Plan Administrator denying her claims for additional benefits. In their counterclaim, Defendants seek reformation of the Plan to correct an alleged scrivener's error.

This Court previously considered these issues applying a deferential standard of review to the Plan administrators' decisions to deny Plaintiff's claims based upon the administrative record. *Young v. Verizon's Bell Atlantic Cash Balance Plan*, 575 F.Supp. 2d 892 (N.D. Ill. 2008). ("Phase I Trial.") Because this case raises novel issues under ERISA and will likely proceed to the Seventh Circuit Court of Appeals, the Court now reviews these issues applying a *de novo* standard of review, while permitting the parties to introduce additional evidence. It is the Court's intention to decide all issues in such a way that the reviewing court can finally resolve the case without the necessity for a later remand.

The Court conducted a second trial on September 1 and 2, 2009 and heard closing arguments on October 5, 2009. ("Phase II Trial.") The Court has carefully considered the testimony of the two witnesses who testified at the trial, the deposition excerpts of the witnesses included in the parties' exhibits, the parties' trial exhibits, the parties' agreed statement of facts, the parties' proposed findings of fact and conclusions

of law, the parties' briefs and the closing arguments of counsel.

The following constitute the Court's findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. To the extent certain findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent matters contained in the conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

I. ISSUES PRESENTED

1. Whether the Defendants properly used an interest rate of 120% of the PBGC rate, rather than 100% of the PBGC rate, in calculating Plaintiff's opening balance ("Discount Rate Issue").

ANSWER: Yes.

2. Whether there was a scrivener's error in Plan § 16.5.1(a)(2) by reason of a second reference to the transition factor in the calculation of the opening balance ("Transition Factor Issue").

ANSWER: Yes.

3. Whether the Defendants are entitled to reformation of the Plan to eliminate the second reference to the transition factor in Plan § 16.5.1(a)(2).

ANSWER: Yes.

4. Whether Plaintiff's claims are barred by the statute of limitations.

ANSWER: No.

5. Whether Defendants' claims are barred by the statute of limitations.

ANSWER: No.

II. FINDINGS OF FACT

A. The Parties.

1. Plaintiff Cynthia N. Young is the Class representative for the Class in this action. AG ¶ 1.[1] She testified by means of a deposition. (DX 58.)

2. Young worked at Bell Atlantic (or one of its acquired subsidiaries) from 1965 through 1997. During the course of her career, she was a telephone operator, service representative, administrative assistant, communications representative, assistant manager, and manager, and she finished her career as a project manager. AG ¶ 2.

3. Young was a participant in a series of defined benefit pension plans, including the Bell

---

[1] The Parties' Agreed Statement of Facts (hereinafter, "AG ¶ ___") (Dkt. 178.) References to "PX __" and "DX __" are references to Plaintiff's and Defendants' trial exhibits, respectively. The parties prepared a Joint Index of Trial Exhibits with cross references to Bates numbers. (Dkt. 186.) Reference to "Dkt. __" are references to docket entries. References to "T. __" are references to the September 1 and 2, 2009 trial transcript. The Court has provided selected citations to the factual record. These are intended to be representative citations and there may be other factual support in the record that is not specifically cited.

Atlantic Management Pension Plan ("BAMPP"), and then the 1996 and 1997 Bell Atlantic Cash Balance Plan ("Cash Balance Plan"). Young retired in 1997 when the 1997 Bell Atlantic Cash Balance Plan was the operative plan and received a lump-sum payment of her benefit on February 2, 1998, in the amount of $286,094.89. AG ¶ 3.

4. Young later received another payment of $9,558.70 related to her participation in the Cash Balance Plan due to a settlement by the Plan with the Equal Employment Opportunity Commission ("EEOC"). AG ¶ 4.

5. Defendant Verizon Communications, Inc. ("Verizon") is a Delaware corporation with its principal place of business in Basking Ridge, New Jersey. Verizon is the successor-in-interest to Bell Atlantic Corporation ("Bell Atlantic"). Bell Atlantic was one of seven regional telephone operating companies created on January 1, 1984 as a result of the divestiture of AT&T. It represented one of 22 local operating companies that AT&T owned and served the northern Atlantic states. Bell Atlantic was headquartered in Philadelphia and consisted of telephone companies in Pennsylvania, New Jersey, Delaware, Maryland, Virginia, West Virginia and the District of Columbia. An agreement to merge Bell Atlantic and NYNEX, the regional telephone operating company for New York and New England, was announced in April 1996 and became final on August 14, 1997. The combined company took the name of Bell Atlantic, with headquarters in New York City and a workforce of 130,000 employees. On July 27, 1998, Bell Atlantic announced an agreement to merge with GTE, and this merger was effective on June 30, 2000, with the new

company taking the name of Verizon Communications, Inc. AG ¶ 5.

6. The merger of Bell Atlantic and NYNEX, and the subsequent merger of Bell Atlantic and GTE, were both large mergers. Bell Atlantic after the first merger and Verizon after the second merger amended their numerous benefit plans, including pension plans and a variety of welfare plans. Bell Atlantic/Verizon implemented these two major mergers and transformed its business from regional telephone operations to a leading provider of national and international wireless telephone and high-speed internet services. AG ¶ 6.

7. Verizon is "both the plan sponsor and the plan's administrator." *Young v. Verizon's Bell Atlantic Cash Balance Plan*, 575 F. Supp. 2d 892, 907 (N.D. Ill. 2008). AG ¶ 6. In 2008, Verizon earned $6.4 billion in profits on revenues of $97.4 billion. (PX 204 and 205.)

B. The Class.

8. The parties stipulated to the treatment of this action as a class action. On January 16, 2007, the Court certified a Class pursuant to Rule 23, Fed. R. Civ. P., with two subclasses. AG ¶ 8; Dkt. 61.

9. Subclass 1 is defined as follows:

> All participants in the Bell Atlantic Management Pension Plan whose opening balances for the Bell Atlantic Cash Balance Plan were purportedly calculated using section 16.5.1 of the Bell

> Atlantic Cash Balance Plan and using 120% of the applicable PBGC rate.

Dkt. 61.

10. The class claim associated with Subclass 1 (hereinafter called the "Discount Rate Issue") is defined as follows:

> Whether, in determining the benefits afforded by the Bell Atlantic Cash Balance Plan to the plaintiff and the Class, it was improper to use 120% of the applicable PBGC interest rate when calculating the "opening balances," and, if proper, the remedy therefor.

Dkt. 61.

11. Subclass 2 is defined as follows:

> All participants in the Bell Atlantic Management Pension Plan whose opening balances for the Bell Atlantic Cash Balance Plan were purportedly calculated using section 16.5.1(a)(2) of the Bell Atlantic Cash Balance Plan.

Dkt. 61

12. The class claim associated with Subclass 2 (hereinafter called the "Transition Factor Issue") is defined as follows:

> Whether, in determining the benefits afforded by the Bell Atlantic Cash

> Balance Plan to plaintiff and the Class, it was proper to apply the cash balance transition factor found in Table 1 of Section 16 of the Cash Balance Plan once rather than twice when calculating the "opening balances," and if improper, the remedy therefor.

Dkt. 61.

13. Young is the class representative for both Subclasses, which taken together are referred to as the "Class." The Class, consisting of both Subclasses, includes approximately 13,784 former and current management employees of Bell Atlantic and later Verizon. AG ¶ 13.

C. The Pension Plans and the Transition to the Cash Balance Plan.

14. The Verizon Management Pension Plan is the successor plan to Verizon's Bell Atlantic Cash Balance Plan. (PX 206 at VZ432.) Verizon's Bell Atlantic Cash Balance Plan was the successor plan to the Bell Atlantic Cash Balance Plan (the foregoing are hereinafter referred to as the "Cash Balance Plan" or the "Plan"). The Bell Atlantic Cash Balance Plan is the successor plan to the Bell Atlantic Management Pension Plan ("BAMPP"). (DX 18 at VZ1053). All of these plans are defined benefit pension plans as defined by ERISA. The effective dates of these plans were as follows:

- BAMPP - for decades prior to December 31, 1995

- Bell Atlantic Cash Balance Plan 7/6/96 - effective 12/31/95
- Bell Atlantic Cash Balance Plan 9/3/07 Restatement - effective 12/31/95
- Bell Atlantic Cash Balance Plan - 10/8/98 - effective 1/1/98
- Bell Atlantic Cash Balance Plan 7/6/99 - effective 1/1/98
- Merged Bell Atlantic & Bell Atlantic-North Plan 12/1/99 - effective 1/1/99
- Verizon's Bell Atlantic Cash Balance Plan 12/31/01 - effective 1/1/99
- Verizon Management Pension Plan 1/1/02 - effective 1/1/02

15. This litigation principally involves the events surrounding the adoption and completion of the Bell Atlantic Cash Balance Plan on July 6, 1996 to replace the BAMPP effective December 31, 1995.

D. Benefits Under the BAMPP.

16. The BAMPP was the principal pension plan that applied to non-union management employees of Bell Atlantic. (T.81.) Salaried management employees of Bell Atlantic participated in the BAMPP, a defined benefit pension plan, for decades until December 31, 1995. A participant's benefit under the BAMPP was expressed in the form of an annuity commencing at age 65. The BAMPP provided that participants who

attained specified age and service levels were eligible for a "Service Pension." (DX 17, BAMPP §§ 4.2-4.3, at VZ110–12.) The Service Pension permitted an eligible participant to begin receiving an annuity before age 65 without a full actuarial reduction to reflect the early commencement of the participant's pension. (*Id.*, BAMPP § 4.3, at VZ111–12.) AG ¶ 14.

17. The BAMPP was structured to provide a very significant increase in the value of the benefit once a participant reached a long-term service point, referred to as a "cliff," which gave an incentive for employees to spend their entire careers with the company. (T. 81.) This took place when the participant became eligible for a Service Pension. (DX 17, BAMPP §§ 4.2-4.4, at VZ 110-13; DX 1 at VZ 10391).

18. Although a participant's retirement benefit was traditionally paid as an annuity, the BAMPP also included certain "windows," during which participants could elect to receive their retirement benefits in the form of a one-time lump sum payment, instead of the traditional annuity. (DX 17 at VZ130–32 & VZ133–35, BAMPP §§ 4.16, 4.19.) AG ¶ 15.

E. Use of Pension Benefit Guaranty Corporation ("PBGC") Interest Rate.

19. Section 4.19 of the BAMPP was one such cash-out "window." It provided for a lump-sum payment (and an accompanying method to calculate that lump-sum) to any vested participant who was an "Active Participant on his Severance from Service Date which occurs on or after December 31,1993 and prior to December 31, 1995." (DX 17 at VZ133.)

20. The lump-sum formula for those who retired between December 31, 1993, and December 30, 1995 was as follows:

> (2) Lump-sum Form of Payment.
>
> (A) Service Pension Cash-Outs. The lump-sum payable to a Window-Eligible Employee who is eligible for a Normal or Early Retirement Service Pension shall equal the Actuarial Equivalent present value (calculated using the assumptions in subsection (c)(2)(C)) of the Service Pension otherwise payable to the Participant in the Normal Form commencing on his Annuity Startign Date, as determined under the provisions of the Plan other than this Section 4.19.
>
> (B) Deferred Vested Pension Cash-Outs. The lump-sum payable to a Window-Eligible Employee who is eligible for a Deferred Vested Pension shall equal the Actuarial Equivalent present value (calculated using the assumptions in subsection (c)(2)(C)) of the Deferred Vested Pension otherwise payable to the Participant in the Normal Form commencing at Normal Retirement Age (or age at Severance from Service Date, if later), as determined under the provisions of the Plan other than this Section 4.19.

(DX 17 at VZ134.)

21. Section 4.19 of the BAMPP uses three assumptions for determining a lump- sum cashout value (DX 17 at VZ134):

(a) The discount rate is 120% of the "PBGC interest rate in effect on the last day of the calendar month immediately preceding the first month of the calendar quarter in which the Severance from Service Date occurs." (DX 17 at VZ134-35);

(b) A participant's expected life span is determined using the "Non-Insured Unisex Pension 1984 (UP84) Mortality Table." (DX 17 at VZ135); and

(c) A participant's age is to be "years, months and days . . . measured as of the 15th day of the middle of the month of the calendar quarter containing the Severance from Service Date, and that age shall be rounded down to a number of whole months." (*Id.*)

22. The Court incorporates by reference its discussion of the background facts to the selection of the appropriate Pension Benefit Guaranty Corporation ("PBGC") interest rate ("Discount Rate Issue") from its prior decision. *Young v. Verizon's Bell Atlantic Cash Balance Plan*, 575 F.Supp. 2d 892 at 899-903.

23. Bell Atlantic consistently applied the same PBGC formula under the BAMPP to determine the actuarial equivalent amount, namely "using 120% (or 100% if your cashout is under $25,000) of the Pension Benefit Guaranty Corporation (PBGC) rates that were in effect ..." (T. 170; DX 70 at VZ10374 for 1993; DX 71 at VZ10380 for the1994-95 Cashout Option Period.)

24. In converting the BAMPP to the Cash Balance Plan, Bell Atlantic communicated to its participants that it would continue to use the "same conversion method used in calculating a cashout payment under the old plan." (DX 1 at VZ10392.) Bell Atlantic sent Estimated Opening Account Balance Statements to each participant in the Cash Balance Plan, which explained in Step 2:

> Step 2: Your accrued benefit is converted to a lump-sum value applying the same method used today to determine lump-sum cashouts and is based on the PBGC interest rate of 5%.

(DX 11 at VZ10476.)

25. The Cash Balance Plan planning documents also reveal an intention to use the same PBGC methodology as before. In the September 26, 1995 memo from Rob Maienshein at Mercer Human Resources Consulting ("Mercer") to Bell Atlantic, he explains: "The beginning account balance as of 1/1/96 will be determined using the lump-sum cashout value of accrued benefits based on the PBGC graded rate structure with an immediate rate of 5.0% (120% of the rate structure will be used for cashout values over $25,000) and the UP-84 mortality table." (DX 5 at VZ10229. See also, 9/27/95 memo from Maienshein, DX 6 at MER4684; 10/22/96 memo from Maienshein, DX 7 at MER4806.)

26. This formula was consistently applied thereafter. In a memo from Robert Moreen ("Moreen"), the Mercer Partner in charge of the Bell Atlantic assignment, dated November 14, 1997, he reviews the three steps in calculating the initial account balances

in the Cash Balance Plan. At step two, he explains: "Determine the lump-sum value of the accrued benefit as of December 31, 1995, using interest (5% PBGC rates, including 120% rates) and mortality (UP-84) assumptions, and calculation procedures, established for use in lump-sum payments from the [BAMPP]." (DX 8 at VZ13307; PX 54 at 238-39.) Moreen testified by means of a deposition. (PX 54.)

27. This formula was made more explicit in the 1998 Cash Balance Plan adopted on October 8, 1998. (DX 31 at 11712-13.) (". . . and using the deferred PBGC rates for individuals who were not then eligible for a Service Pension or 120% of the PBGC rate if the present value, using the PBGC rate, is $25,000 or more.") This clarifying language also appeared in the April 22, 1998 draft of the 1998 Cash Balance Plan. (PX 471 at MLB 547; T. 162 - 63.)

F. The Development of the Transition Factors.

28. In 1994, Bell Atlantic began to consider a new pension plan design. (T. 82.) Bell Atlantic hired Mercer to start from scratch, analyze the current Plan, and come up with a new plan that "employees could believe in and is fair." (T. 83.) Mercer worked with the Bell Atlantic design team to interview employees, conduct focus groups and to perform an immense amount of statistical analysis to help design a plan consistent with Bell Atlantic's new business model. (T. 83-84.) Mercer ultimately recommended a cash balance plan with gradually and predictably increasing values, thereby eliminating the "cliffs" present in the BAMPP. (T. 84-85.) One of the big challenges facing Bell Atlantic was to develop a transition formula to fairly

treat participants in the BAMPP as they were transitioned to the Cash Balance Plan. (T. 85-87.)

29. Mercer assisted in developing the cash balance formula, including the formula for establishing the opening balances of participants who had previously earned pension benefits under the BAMPP. (T.83-86; DX 54 at 30.) Mercer also assisted in preparing the specifications for the calculation of the opening balances. Coopers & Lybrand was retained by Bell Atlantic to perform the opening balance calculations. (DX 54 at 102-03, 135-36.) AG ¶ 22.

30. On September 26, 1995, Mercer submitted a memorandum to Bell Atlantic, which included a copy of the plan's transition factor table and a 15-year projection of liabilities. (DX 5, DX 54 at 213–26.) AG ¶ 23. The projected liabilities were based on the transition factor being multiplied once, not twice. (DX 54 at 243-44). Mercer's cover memorandum submitting its final recommendation for the Cash Balance Plan explained that the transition factor was to be multiplied only once by the lump-sum cashout value:

> The following items should be noted about the calculation of initial cash balance accounts as of January 1, 1996 using the attached recommended final transition tables:
>
> * * *
>
> The lump sum cash out value is then multiplied by the transition factor provided on the attached transition tables to calculate the actual opening balance under the cash balance plan.

(DX 5 at VZ 10229; T. 88-89.) The projected liabilities were predicated on multiplying the transition factor only once. *(Id.)*

31. On September 27, 1995, Mercer sent Coopers & Lybrand the specifications to calculate the opening balances as of December 31, 1995. (DX 6 at MER4684-85; DX 54 at 102–112, 221–228.) AG ¶ 24. Those specifications provided for multiplying the lump-sum cashout value times the transition factor only once, not twice. *(Id.)*

32. The transition factors in the table attached to Mercer's September 26, 1995 memorandum to Bell Atlantic and its September 27 memorandum to Coopers & Lybrand were the same ones used to calculate the actual opening balances in January 1996 and the same ones contained in the tables attached to the July 1996 Cash Balance Plan. (Compare DX 18, 1996 Plan Art. 16, at VZ 1102-03 with DX 5 at VZ 10233-34 and DX 6 at MER 4686-87.) These documents and the related testimony by Moreen, the Mercer Partner in charge of the Bell Atlantic engagement, and Barry Peters, the in-house counsel responsible for drafting the Cash Balance Plan, fully support a finding that Defendants intended to multiply the transition factor only once. (DX 54 at 234-44; T. 88-89.)

33. Mercer created two additional memoranda, dated October 22, 1996, and November 14, 1997, relating to and describing the methodology that had been used to calculate opening balances. (DX 7, DX 8.) AG ¶ 25. Mercer's description confirmed its continued understanding that the lump-sum cash-out value

under the BAMPP had been multiplied only once by the transition factor. (*Id.*; DX 54 at 234-44.)

34. According to Moreen, during the development of the Cash Balance formula, "the idea of multiplying twice by the transition factor was never once discussed." (DX 54 at 105-06, 125, 243-44.)

35. Multiplying the lump-sum cashout value by the transition factor twice would have "vitiated" the goals that guided the construction of the transition factor table because it would have given participants benefits that were far more valuable than the benefits they could have earned under the BAMPP. (*Id.*, DX 54 at 230-32.) On October 22, 1996, Mercer provided Bell Atlantic with a detailed explanation of how the transition multipliers were developed. (DX 7.) Mercer begins the explanation as follows:

> the Transition Multipliers were developed in order to provide a smooth transition between the ultimate retirement benefit level of the old Bell Atlantic Management Pension Plan (BAMPP) and the new Bell Atlantic Cash Balance Plan. The Multipliers were developed to be applied to the 12/31/95 lump sum value of the BAMPP accrued benefit producing the opening account balance under the Cash Balance Account.

(*Id.* at MER 4806; DX 54 at 232-37.)

G. The Corporate Approval of the Cash Balance Plan Design.

36. Bell Atlantic's Corporate Employee Benefits Committee ("CEBC") adopted a resolution in October 1995 authorizing the transition from the BAMPP to the Cash Balance Plan. (DX 3.) AG ¶ 26. The resolution specified that a participant's opening balance in the Plan would equal "the product of the cashout value of the participant's accrued benefit on the Effective Date (determined under the existing rules of BAMPP as of 12/31/95) times a transition factor (greater than or equal to 1.0) according to the table presented to this meeting..." (DX 4 at VZ 1039.) The table presented at the meeting was the Transition Factor table submitted by Mercer in September 1995. (DX 5 at VZ10233-34.)

37. In November 1995 the Human Resources Committee ("HRC") of Bell Atlantic's Board of Directors approved the amendment of the BAMPP, effective December 31, 1995, to create the Cash Balance Plan. (DX 4.) AG ¶ 27.

H. Pre-Conversion Communications to Participants.

38. Bell Atlantic clearly and consistently communicated to its employees that the transition factor would be multiplied only once in establishing the employees' opening balances.

39. In or around October 1995, Bell Atlantic created a communication plan relating to the Cash Balance Plan. (PX 431, VZ10534-36.) AG ¶ 28. One of the objectives of the communications plan was to

"provide clear understanding of the plan design provisions, while placing special emphasis on the plan's transition features." (PX 431 at VZ10534). The communications plan also called for all management employees who were participants as of 1/1/96 to receive a retirement planning guide in March 1996 "to show employees their plan balances as of 12/31/95." (*Id.* at 10535).

40. In October 1995, Bell Atlantic sent all BAMPP participants a brochure entitled "Introducing Your Cash Balance Plan." (DX 1.) AG ¶ 29. The brochure contains a graph to show the differece between the BAMPP with its "cliff" and the Cash Balance Plan, which provides steadily growing benefits. (DX 1 at VZ10391.) The brochure described the provisions of the new cash balance formula, including the formula for calculating the opening balances of participants who had earned pension entitlements under the BAMPP. (DX 1.) "Introducing Your Cash Balance Plan" constituted a Summary of Material Modifications ("SMM") under ERISA § 104(b)(1) and 29 C.F.R. § 2520.104b-3 (2009) because it described material changes in the plan and was "written in a manner calculated to be understood by the average plan participant." The document was intended to be a SMM and was designed to accurately and visually communicate the summary of changes to the Plan participants. (T. 102-105, 182). The SMM used the following formula to show how a participant's lump-sum cashout benefit under the BAMPP would be converted to the opening balance under the new Cash Balance Plan:

OLD PLAN LUMP SUM VALUE	x	TRANSITION MULTIPLIER	=	OPENING ACCOUNT BALANCE

(DX1 at VZ10392.) The SMM also explained the benefit conversion in words:

> Step 1: Your current pension benefit will be calculated based on your age, service and pay as of December 31, 1995.
>
> Step 2: Next, your current benefit will be converted to a lump-sum cash-out value, using the same conversion method used in calculating a cash-out payment under the old plan. . .
>
> Step 3: Finally, to make sure the new Plan continues to provide you with a fair benefit, your account balance may be increased by multiplying the lump-sum cash-out value determined in Step 2 times a special transition multiplier to arrive at your opening account balance.

(*Id.*) The terms "lump-sum cash out" and "transition multiplier" were defined in the SMM as follows:

> Lump-Sum Cash Out.
>
> Full payment of the value of your cash balance account at one time.
>
> Transition Multiplier.

> A number used to figure your opening account balance in the Cash Balance Plan on January 1, 1996. This number is based on your age and service. Your multiplier may increase your initial account balance to ensure equitable treatment during the transition to the Cash Balace Plan.

(*Id.* at 10386.)

41. The SMM provided hypothetical examples of the impact of "the transition multiplier" on Plan participants. (DX 1 at VZ10393-94.) One example, "Alison," was a 47 year-old employee with 27 years of Bell Atlantic service on the conversion date. (*Id.* at VZ10394.) The SMM explained:

> Her transition multiplier of 2.680 increases her opening account balance so that, together with future pay credits and interest credits, the gap between the old plan and the new Cash Balance Plan will be filled.

(*Id.*) If Bell Atlantic had intended to multiply the transition factor twice, "Alison's" transition multiplier would have been 7.1824 (2.68 x 2.68), not 2.68, and her opening balance would nearly triple.

42. The SMM also contained the following disclaimer in small print on the back page: "If there is any conflict between the Plan document and this brochure, the text of the Plan document is controlling." (*Id.* at VZ10396).

43. In letters to plan participants in October 1995, November 1995 and May 1996, Bell Atlantic

repeatedly instructed participants to "please be sure to read" and "please refer to" the SMM, "Introducing Your Cash Balance Plan" (which Bell Atlantic referred to as "the Cash Balance brochure"), for an accurate statement of the Plan's opening balance and transition factor provisions. (DX10 at VZ10553; DX11 at VZ10476; DX13 at VZ10519.) These documents also contained disclaimers that in the event there were discrepancies between these communications and the Plan, the Plan would govern. (DX11 at VZ10477; DX13 at VZ10490.)

44. In October 1995, Bell Atlantic prepared a video for BAMPP participants, entitled "Changes," to describe the transition to the Cash Balance Plan. (DX 10.) AG ¶ 30. In the video, Bell Atlantic explained that the participants would receive a statement with an opening account balance and an explanation of how the transition factor applied to their account. (*Id.* at VZ 10553.)

45. In November 1995, Bell Atlantic sent estimated "opening account balance" statements to BAMPP participants. (DX 11.) AG ¶ 31. These statements provided each participant with an estimate of his or her opening balance in the Cash Balance Plan, provided a step-by-step description of the opening balance formula, and contained a table of the Plan's transition factors. (*Id.* at VZ10475-76.) A sample statement for a 36-year, 9-month old employee with 14 years and 3 months of service as of January 1, 1996 stated:

> STEP 1:
> Your monthly Age 65 Deferred Pension benefit as a Single Life Annuity estimated at 12/31/1995 is . . . . $1,520.
>
> STEP 2:
> Your monthly pension converted to a lump-sum cash-out value at 12/31/1995 is . . . . $35,812.
>
> STEP 3:
> Your lump-sum amount times your transition multiplier of 1.480 is your Estimated Opening Account Balance. . . . $53,001.

(*Id.* at VZ10476.) The statement explains that the Step 2 calculation uses "the same method used today to determine lump-sum cash outs and is based on the PBGC interest rate of 5%." (*Id.*)

I. Implemention of the Cash Balance Plan as of January 1, 1996.

46. Bell Atlantic amended and restated the BAMPP effective December 31, 1995, and changed its name to the "Bell Atlantic Cash Balance Plan." (DX 3, 4, 18). The Cash Balance Plan expressed a participant's benefit as a lump-sum balance, to which pay and interest credits were added on a monthly basis. (DX 18, 1996 Plan Art. IV, at VZ1064–66.) AG ¶ 16. Upon severance from the company, a participant could receive his or her pension benefit as either a lump sum or an annuity. (*Id.*, 1996 Plan, § 5.2, at VZ 1067-68). Bell Atlantic began implemention of the

Cash Balance Plan as of January 1, 1996, however, the Plan document was not finalized until July 6, 1996.

47. The Cash Balance Plan provided opening balances for each participant. Those opening balances were established for all 13,784 active BAMPP participants retroactive to January 1, 1996. (DX 62). AG ¶ 17. These included 2,271 participants who were already eligible for a Service Pension and 11,513 who were not eligible for a Service Pension. (DX 62). These opening balances were based on their pension entitlement earned under the BAMPP. (DX 18, 1996 Plan § 16.5 at VZ 1100-03; DX 1 at VZ 10392).

48. All of the calculations were performed by multiplying the transition factor only once. Of the 11,513 participants not eligible for a Service Pension, 10,808 had transition factors greater than 1.000. Most of them–approximately 8,600–had transition factors of 1.5 or higher, and 4,750 had transition factors of 2.000 or higher. The 2,271 Service Pension eligible participants for whom opening balances were established included 762 with transition factors greater than 1.000. (DX51, DX62.)

49. One variable in the calculation of opening balances was the annuity that participants had earned under the BAMPP. (DX 18, 1996 Plan § 16.5 at VZ1100-03; DX 1 at VZ10392). AG ¶ 18.

50. The formula to establish the opening balance consisted of two steps: (1) calculating the lump-sum cashout value of the participant's annuity under the BAMPP; and (2) multiplying the lump-sum cashout value by a transition factor. (DX 18, 1996 Plan § 16.5.1(a) at VZ 1100; DX 1 at VZ10392.) The opening

balances of the Cash Balance Plan participants thereafter grew through the addition of pay credits and interest credits. (DX 18, 1996 Plan §§ 4.4-4.5 at VZ 1065; DX 1 at VZ10389-90.)

51. The transition factors were designed so that participants who were close to reaching the age and service thresholds for a Service Pension under the BAMPP, and thus were expecting to see an upward spike in the value of their BAMPP accrued benefit, would receive a retirement benefit that approximated the expected cashout value of their Service Pension under the BAMPP. (T. 83-87; DX 1 at VZ 1391-94; DX 7 at MER 4806-09; DX 8 at VZ13307-08.) Transition factors were carried to three decimal places and ranged from 1.000 to 3.105. (DX 18, 1996 Plan Art. 16, at VZ 1102-03.) The applicable transition factor depended on the participant's age and service. (*Id.*) Young participants with relatively little service had a transition factor of 1.000. (*Id.*) The closer a participant was to qualifying for a Service Pension under the BAMPP, the higher the participant's transition factor. (*Id.*) For participants 40-46 years old with 16-20 years of service, for example, the transition factors were as follows:

YEARS OF SERVICE					
AGE	**16**	**17**	**18**	**19**	**20**
40	1.589	1.620	1.657	1.675	1.714
41	1.596	1.629	1.665	1.686	1.697
42	1.603	1.637	1.674	1.697	1.710
43	1.610	1.646	1.682	1.708	1.724

YEARS OF SERVICE					
44	1.618	1.655	1.691	1.719	1.737
45	1.625	1.664	1.699	1.730	1.751
46	1.632	1.672	1.707	1.741	1.764

(*Id.* at VZ 1102.) Most participants who had already become eligible for a Service Pension under the BAMPP, and had already experienced the upward spike in the value of their BAMPP accrued benefit, had a transition factor of 1.000. (*Id.* at VZ 1103.) Transition factors were carried to three decimal places and ranged from 1.000 to 3.105 depending on a participant's age and service. (DX 18, 1996 Plan Art. 16, at VZ1102–03.) AG ¶ 19.

52. Multiplying the transition factors twice, rather than once, for the participants who were not eligible for a Service Pension would have increased their opening balances by $1.67 billion. The opening balances of the 4,750 participants with transition factors greater than 2.000 would have been at least doubled, and in many cases nearly tripled, if their transition factors had been squared. More than 5,780 participants would have received increases in the opening balances of $100,000 or more – increases that would have given them opening balances that exceeded the opening balances of many of the 2,271 participants whose longer service or higher age had already qualified them for a Service Pension. (DX51, DX62.)

53. Young was a salaried employee of Bell Atlantic. As of January 1, 1996, Young was approximately 48 years-old and had 27.8 years of Bell

Atlantic net credited service. Her transition factor was 2.659. (DX 14 at Y811.) AG ¶ 20.

54. The average Class member's years of service at Bell Atlantic as of year-end 1995 was 20 years. (DX at VZ27114-323.) AG ¶ 21.

J. Post-Conversion Employee Communications.

55. Following the conversion, Bell Atlantic and Verizon consistently communicated to the participants that the transition factor would be multiplied only once in determining the participant's opening account balance and the same BAMPP method for determining the lump-sum cash out value was being used in the Cash Balance Plan.

56. In May 1996, Bell Atlantic provided each participant in the Cash Balance Plan with a customized retirement planning guide, "A Look at Your Future Today: Your Retirement Planning Guide." (DX13.) AG ¶ 32. This guide included a personalized "opening balance" statement setting forth each participant's actual opening balance calculation. (*Id.* at VZ10519.) These actual opening balance statements explained that each participant's lump sum cash-out value would be multiplied by the applicable transition factor only once. (*Id.*) The sample page further explains at Step 3: "Your account balance may have been increased by applying a transition multiplier to the lump-sum value of your pension benefit at 12/31/95. Transition multipliers vary by age and service." (*Id.*) The Retirement Planning Guide contained the following disclaimer: "If there are any discrepancies between the information in this guide

and official Plan documents, the Plan documents will always govern." (DX 13 at VZ10490.)

57. Starting June 30, 1996, Bell Atlantic sent participants a quarterly statement that, among other information, set forth the participant's current balance in the cash balance plan. (Eg., DX 15.) AG ¶ 33. By June 30, 1996, Bell Atlantic had completed more than 50,000 separate mailings to participants, each of which made clear that the lump-sum cash out was multiplied by the transition factor just once. (DX1, DX11, DX13.)

58. In August 1996, Bell Atlantic issued a summary plan description for the Cash Balance Plan as part of a document entitled "The Big Picture." (PX 232 at 678-96.)

K. Communications to Plaintiff.

59. There is no evidence that the Plaintiff or any class member ever relied upon the transition factor being multiplied more than once in determining the participant's opening balance. Prior to this litigation, no class member ever claimed the transition factor was to be multiplied more than once in determining their opening balance.

60. Plaintiff does not assert that she ever reviewed or relied on the mistaken language in the 1996 and 1997 Plans. She never looked at the Plans until 2008, when her lawyers were preparing her for deposition, at which time she merely "glanced" at them. (DX 58 at 84-87.)

61. The 1996 version of the Cash Balance Plan, including appendices, was nearly 150 pages because

the Appendix included the BAMPP. (DX17, DX18.) Except in the event of a specific request by a Plan participant, Bell Atlantic did not distribute to participants the restated document containing the erroneous description of the § 16.5.1(a)(2) opening balance formula. (DX9 at VZ10400.) Although Bell Atlantic regularly provided participants with information on how to obtain a copy of the Plan, few requests were received for copies of the Plan document. (DX67 at 11-12.)

62. Plaintiff received from Bell Atlantic and retained in her personal files numerous communications plainly stating that her opening balance would be calculated based on a one-time multiplication by the transition factor. (DX 58 at 28-46.) One of the documents Plaintiff received, reviewed and kept in her files was the October 1995 SMM, "Introducing Your Cash Balance Plan." (DX12.) Plaintiff wrote her name on this document and kept it in her files for more than 10 years with other "important" documents relating to her employment. (DX58 at 28-37.)

63. Plaintiff also produced from her files the Estimated Opening Account Balance Statement ("Specially prepared for: Cynthia Young"), which was distributed in November 1995. (DX12.) This document explained the calculation of Plaintiff's opening balance as follows:

> STEP 1:
> Your monthly age 65 Deferred Pension benefit as a Single Life Annuity estimated at 12/31/95 is . . . $2,160.

STEP 2:
Your monthly pension converted to a lump-sum cash-out value at 12/31/95 is . . . $90,027.

STEP 3:
Your lump-sum amount times your transition multiplier of 2.659 is your Estimated Opening Account Balance . . . $239,381.

(*Id.* at Y842.)

64. Plaintiff produced from her files the May 1996 booklet, "A Look at Your Future Today," which was sent to her home and described the actual calculation of her opening account balance on January 1, 1996 as follows:

STEP 1:
Your monthly Age 65 Deferred Pension benefit as a Single Life Annuity at 12/31/95 was . . . $2,166.70.

STEP 2:
Your monthly pension converted to a lump-sum cash-out value at 12/31/95 was . . . $90,307.16

STEP 3:
Your lump-sum amount times your transition multiplier of 2.659 is your Opening Account Balance on 1/1/96 . . . $240,126.74.

(DX14 at Y811; DX58 at 48-51).

65. Plaintiff produced from her files the quarterly statements she received showing her Cash Balance Plan Account status at the start of each

quarter and the amount it increased through pay and interest credits. (DX15, DX58 at 56-57.) Following her retirement, she cashed out her account in February 1998. (DX 58 at 68, DX15, DX 64.)

66. Squaring the transition factor would have produced balances far greater than the amounts communicated to Plaintiff in November 1995, in May 1996, and quarterly from June 30, 1996 until she cashed out in early 1998. Squaring the transition factor would have increased the estimated opening balance communicated to Plaintiff in November 1995 from $239,581 to $636,516.

L. The Actuarial Report.

67. The Plan actuary, Towers Perrin, prepared an actuarial report for the Cash Balance Plan in January 1997, in which Towers Perrin attempted to determine the Plan's liabilities and assets as of January 1, 1996. (DX16.) AG 51. This report was based on the understanding that the Plan's opening balances for BAMPP participants were calculated by multiplying each participant's lump sum cash-out value by the transition factor one time. (*Id.* at VZ13295-96.)

68. If the opening balances were to be calculated by multiplying each participant's lump sum cash-out value by the square of the transition factor, the Plan's liabilities would have increased by at least $1.67 billion above the amount reported by Towers Perrin. (*Id.* at VZ13263, VZ13270, VZ13274; DX51, DX62.)

M. Drafting History of the July 1996 Cash Balance Plan.

69. The drafting history of the Cash Balance Plan demonstrates by clear and convincing evidence that a scrivener's error and mistake were made in the drafting of the restated Plan document by including two references to the transition factor in § 16.5.1(a)(2) of the Plan.

70. The restated Plan document was finalized on July 6, 1996, and was effective December 31, 1995. (DX 18.) AG ¶ 35. The restated Plan document was finalized after Bell Atlantic calculated the actual opening balances and communicated them to all 13,784 plan participants. (DX18.)

71. Barry Peters ("Peters") joined Bell Atlantic in 1986 to serve as in-house counsel responsible for all ERISA matters and employee benefit issues. (T. 76-80; DX 56 at 13.) Although the Bell Atlantic in-house legal department consisted of over 100 attorneys from 1986-1998, Peters was the only attorney at Bell Atlantic with extensive experience and knowledge of ERISA during that time. (*Id.*) His duties at Bell Atlantic included preparing governance documentation for the board of directors and its Human Resources Committee regarding all benefit plans, benefits matters, and being the company's ERISA expert. (DX 56 at 11-14.) Peters left Bell Atlantic in 2001 to work at Mercer Human Resources Consulting until he retired in 2007. (*Id.* 14-15). Peters testified at trial and by means of two depositions. (T. 73-199, DX 56-57.)

72. Peters was also highly involved in work dealing with compensation and benefits of the

corporate executives in mergers and acquisitions that Bell Atlantic engaged in during the 1990s. (T. 78-79; DX 56 at 14.)

73. Peters was the Bell Atlantic employee responsible for coordinating and steering the plan documentation process. (DX 56 at 50.) Peters was located in the Philadelphia headquarters of Bell Atlantic, and he was counsel to the Corporate Employees Benefits Committee ("CEBC.") (T. 77-78; DX 56 at 12–14, 149.) Peters was "the person authorized by resolutions of the CEBC to maintain and publish the benefits plans adopted and amended by the Committee . . ." (PX 219 at VZ14438.)

74. Peters was the only person at Bell Atlantic charged with the responsibility of ensuring that the 1996 Plan conformed to the intent of Bell Atlantic in converting the BAMPP to a cash balance design. (DX 57 at 18–19.) He never assigned anyone else the responsibility to review the plan document in general or the transition rules specifically to avoid drafting errors. (*Id.* at 19.) AG ¶ 43.

75. The conversion of the BAMPP to the Cash Balance Plan was the single most complicated plan drafting assignment Peters ever faced in his career. (DX 56 at 78:7–25.) It involved converting a decades-old traditional pension plan to a new formula that looked more like a defined contribution plan and reviewing and accounting for numerous intricate additional plan options and amendments. (*Id.* at 78.) The BAMPP (and the Cash Balance Plan) covered tens of thousands of employees and over $5 billion in liabilities. (VZ22019.) AG ¶ 44.

76. Robert Abramowitz ("Abramowitz"), a partner in the law firm of Morgan Lewis and Bockius ("Morgan Lewis") was hired to provide outside legal assistance in the drafting of the Cash Balance Plan. (T. 205-06.) Abramowitz is an expert in ERISA. (T. 204-05; DX 55 at 33-34.) He has been involved in the drafting and amendment of hundreds of emloyee benefit plans, including 10 to 20 plans that were converted to a cash balance design. (DX 55 at 37). He testified at trial and by deposition. (T. 203-59, DX 55.)

77. Abramowitz was assisted by Kathy Capone, an ERISA paralegal, Vivian McCardell, a senior associate, and Marianne Grey, a benefits analyst. (T. 206-207.) Ms. Capone testified by means of a deposition. (DX 59.)

78. Paul Strella ("Strella") was a principal at Mercer and an attorney who "knew the law surrounding cash balance plans very well." (DX 54 at 212; DX 21 at VZ11119.) Strella was the head of the document drafting working group on the team Mercer assembled for the Bell Atlantic cash balance conversion. (PX 222 at MER20675.)

79. Six drafts of the Cash Balance Plan exist. Mercer was engaged to prepare the initial drafts "to have a high level of confidence that it would reflect the design that Mercer had been so intimately involved in." (T. 57 at 20.) Strella prepared the first three drafts, completing the first in August 1995, the second in September 1995, and the third in October 1995. (T. 90, 93; DX 19, 20, 21; DX 56 at 51-53). The three Mercer drafts express the opening balance formulas for Service Pension eligible and non-Service Pension eligible participants in similar terms, using a single

transition factor. (DX 19 at VZ10804–05; DX 20 at VZ10971–77; DX 21 at VZ11144–45.) AG ¶ 37. The relevant language in the third draft of the Plan prepared by Mercer states:

> (i) 1995 Active Participants and 1995 Former Active Participants. In the case of a 1995 Active Participant or 1995 Former Active Participant, the opening balance of the Participant's Cash Balance Account on January 1, 1996 shall be the amount described in (I) or (II) below, as applicable:
>
> (I) If, as of December 31, 1995, the Participant was eligible for a Normal Retirement Service Pension or an Early Retirement Service Pension under the 1995 Plan, then the amount described in this paragraph (I) is the present value of the immediate benefit payable commencing on January 1, 1996 under the 1995 Plan, determined as if the participant had retired on December 31, 1995, based on Compensation paid through December 31, 1995, or the date of status change to a non-Eligible Employee category, if earlier, **multiplied by the applicable transition factor** described in Schedule D.
>
> (II) In the case of a Participant not described in (I) above, the amount described in this paragraph (II) is the present value as of January 1, 1996 of the Accrued Pension Benefit payable at age 65 under the 1995 Plan, determined as if the Participant had a Severance From Service Date on December 31, 1995, based on Compensation paid through

> December 31, 1995, or the date of status change to a non-Eligible Employee category, if earlier, **multiplied by the applicable transition factor** described in Schedule D.

(DX 21 at VZ11145 (emphasis added).)

80. Beginning with Draft 4, Mercer was no longer responsible for preparing revisions to the draft plan. (T. 93; DX 56 at 149.) Peters prepared Draft 4 of the Cash Balance Plan, dated April 15, 1996. (T. 95, DX 56 at 53; see also DX 22.) Draft 4 is the first draft of the Plan that contains a second reference to the transition factor in the opening balance formula for nonservice pension eligible participants. (DX 22 at VZ11248.) AG ¶ 38.

81. The introduction of the second reference to the transition factor in the opening balance formula was a scrivener's error made by Peters. Peters edited and reorganized the language governing the calculation of the opening balances in an effort to make the text more clear. (DX56 at 73-74; T. 97-100.) As revised, Draft 4 expressed the opening balance as "the product" of one number "times" another, setting off the two components of the opening balance formula with a capital "A" and "B" in parentheses, and with "times" in italics to emphasize that "[y]ou multiply block 'A' *times* block 'B.'" (DX56 at 58-60; 62-64; 73-75.) The draft also made the transition factor a defined term, and highlighted this through the use of initial capitals – "Transition Factor." (DX56 at 58-59.) Peters' Draft 4 also reversed the order of the two components of the opening balance formula, placing the more succinctly described term, the Transition Factor, first, so that the "(A) times (B)" structure was more obvious,

and used a Bell Atlantic term of art, "lump-sum cashout value" for the other component of the formula. (DX56 at 59, 62-63.) Peters also changed the format of the transition factor table by splitting it in two, with one table for those eligible for a service pension and the other for those not eligible. (DX 22 at VZ 11248.) It was Peters' practice to perform all drafting and make all changes "on screen on the word processor." (T. 130-31.)

82. Thus, Peters revised § 4.3.1(a)(1) (the predecessor to Plan § 16.5.1(a)(1)) in draft 4 as follows:

> **4.3.1(a)(1) If Eligible for Service Pension:** If, as of December 31, 1995, the Participant was eligible for a Normal Retirement Service Pension or an Early Retirement Service Pension under the 1995 BAMPP Plan, then the amount described in this paragraph (1) is **the product of multiplying (A) the Participant's applicable Transition Factor described in Schedule C, *times* (B) the lump-sum cashout value** of the immediate annuity benefit under the 1995 BAMPP Plan, determined as if the Participant had retired on December 31, 1995.

(DX22 at VZ11248 (bold emphasis added).

83. Peters revised § 4.3.1(a)(2) (the predecessor of Plan § 16.5.1(a)(2)) and mistakenly inserted the second reference to the transition factor into the Fourth draft:

> **4.3.1.(a)(2) Not Eligible for Service Pension:**
> In the case of a Participant who is not eligible for a Service Pension under the 1995 BAMPP Plan as of the Transition Date, the amount described in this paragraph (2) is **the product of multiplying (A) the Participant's applicable Transition Factor described in Schedule D, *times* (B) the lump-sum cashout value** of the Accrued Benefit payable at age 65 under the 1995 BAMPP Plan, determined as if the Participant had a Severance From Service Date on December 31, 1995, based on Compensation paid through December 31, 1995, or the date of status change to a non-Eligible Employee category, if earlier, **multiplied by the applicable transition factor described in Schedule C**.

(DX 22 at VZ11248 (bold emphasis added).)

84. In revising § 4.3.1(a)(2), Peters made a drafting error in one of the most important provisions in the Plan. Working on a word processor, and attempting to make the same revisions in § 4.3.1(a)(2) as he did in § 4.3.1(a)(1), Peters neglected to delete the "trailing clause" at the end of the paragraph, "multiplied by the applicable transition factor described in Schedule C." (DX22, DX56 at 58-64, 70, 73-75, 78; T. 100-01.)

85. As a result of Peters' mistake, the formula in § 4.3.1(a)(2) called for the lump sum cashout value to be multiplied by the transition factor twice; rather than once as intended. (DX 22 at VZ11248; T. 100-01.)

86. The Court accepts Peters' testimony that he made a drafting mistake that was inconsistent with the authorization he was given. ("I made an error ... I failed to delete the words at the very end of the second paragraph."); (T. 100-01) ("I failed to delete this trailing clause at the end of the paragraph that says 'Multiplied by the applicable transition factor described in Schedule C.' I know that's an error because it's contrary to the terms of the plan that were approved. . . . This is the first draft that I had a hands-on role in doing and this is an error that I, therefore, made.") (DX 56 at 74); ("I believe I made an error that was unintentional and I did not know I made the error. . . . It was a good faith error which I regret."); (*Id.* at 111) ("I never knew of the error that I had made and I never heard anyone tell me that that text problem existed.") (*Id.* at 78); ("I was always working electronically so that I could share my work more efficiently with both people in my company and elsewhere, and I must not have seen clearly the words that had been left at the end of that paragraph ... It was unfortunately my own mistake by my own hand.") (T. 101.)

87. On April 9, 1996, Peters stated in an e-mail memo to Susan McClain, Joseph Ronan Jr., and Gordon Downing at Bell Atlantic and Abramowitz at Morgan Lewis that the Fourth draft "reflects my review and changes of the 3rd draft that had been presented to us by Paul Strella of Mercer." (PX 226 at VZ11226.) In his e-mail, Peters asked McClain to review the document and "share it with Kwasha Lipton [the company performing the intricate computer programming to calculate the benefits], to make sure they review it with an eye to assuring that it accurately reflects the mechanics and programming

that has been built into the administration of the plan." (*Id.*) Peters noted in his e-mail that Abramowitz and Grey, his paralegal, were "standing by to assist in finalizing the drafting process, and assisting us with the eventual submission of the document to the IRS." (*Id.*) He also instructed Abramowitz "not to begin any revision work until you [McClain] and Kwasha have had a chance to make any changes to fix any problems that you find." (*Id.*) Finally, Peters noted that one of the "pieces that still remain to be completed" was "physically moving" the transition-related provisions "to a Section at the back of the plan that is solely devoted to transition rules." (*Id.*)

88. Abramowitz reviewed the Fourth draft and made written notes on the document. (T. 223-25; PX 225 at VZ11248.) Significantly, he underlined a portion of the sentence immediately preceding the second transition factor reference in Section 4.3.1(a)(2). (*Id.*) He clearly read this entire paragraph but did not notice an error. (T. 225.) Abramowitz understood that responsibility for the transition factors rested with Mercer and Bell Atlantic. (T. 215.)

89. Peters was negligent in failing to notice and correct the scrivener's error in the Fifth draft. Like the Fourth draft, the Fifth draft of the Cash Balance Plan contains a second reference to the transition factor in Section 4.3.1(a)(2). (PX 227 at VZ11379.) The changes suggested by Abramowitz in Section 4.3.1(a)(2) were made and blackline versions were prepared. (PX 228 at VZ11447.) Changes were noted immediately before and immediately after the second reference to the transition factor. (*Id.*)

90. Peters also prepared the Fifth draft dated June 6 1996 (DX 23), which he sent to Marianne Grey, a benefits analyst at Morgan Lewis, on June 7, 1996. (PX228 at VZ11446-47.) AG ¶ 39. The "blackline" version of the Fifth draft shows that Peters: (1) changed the first transition factor reference from "described in Schedule D" to "described in Schedule C," (2) immediately before the second reference to the transition factor, he deleted the text "or the date of status change to a non Eligible Employee category, if earlier," and (3) immediately after the second reference to the transition factor, he added the sentence "For a 1995 Former Active Participant, the date on which the individual ceased to be an Eligible Employee shall be substituted for December 31, 1995 in the last phrase of the previous sentence." (PX 228 at VZ11446–47.) Despite all of the changes made immediately before and immediately after the second reference to the transition factor, Peters claims no one brought the issue of the second transition factor to his attention. (T. 140-41; PX 228 at VZ11446-47.) Peters made approximately 240 changes to the Fourth draft in preparing the Fifth draft. (T. 133.)

91. Specifically, Section 4.3.1(a)(2) of the blackline version of the Fifth draft reads as follows:

> **4.3.1(a)(2) Not Eligible for Service Pension** In the case of a Participant who is not eligible for a Service Pension under the 1995 BAMPP Plan as of the Transition Date, the amount described in this paragraph (2) is the product of multiplying (A) the Participant's applicable Transition Factor described in Schedule ~~D~~C *times* (B) the lump-sum cashout value of the Accrued Benefit payable at age 65 under the

> 1995 BAMPP Plan, determined as if the Participant had a Severance From Service Date on December 31, 1995, based on Compensation paid through December 31, 1995, ~~or the date of status change to a non-Eligible Employee category, if earlier~~, **multiplied by the applicable transition factor described in Schedule C.** For a 1995 Former Active Participant, the date on which the individual ceased to be an Eligible Employee shall be substituted for December 31, 1995 in the last phrase of the previous sentence.

(PX 228 at VZ11446-47.) (Emphasis added.)

92. In a handwritten note to Grey on the cover of the blacklined version of the Fifth draft, Peters noted that "[t]his is blacklined to show changes from the prior draft that you and Bob reviewed and commented on." (PX 228 at VZ11423.) Peters' handwritten note asks Grey to print a copy for Abramowitz. (*Id.*)

93. On or around June 7, 1996, Peters asked Abramowitz to execute the "physical move" of the transition rules to a separate section at the back of the Cash Balance Plan. (PX 448, DX 55 at 132-33.) Peters did not expect Morgan Lewis to review the transition factor formula. (T. 143.)

94. On July 1, 1996, Abramowitz sent a Sixth draft of the Cash Balance Plan to Peters. (DX 24.) This was the first draft prepared by Morgan Lewis. (T. 229.) As Peters requested, the cash balance transition provisions were moved to a separate section, Appendix B, in the Sixth draft. (DX 24 at VZ11561–68.) The Sixth draft also includes the second reference to the

transition factor. (*Id.* at VZ11565.) Abramowitz does not recall anyone at Morgan Lewis ever bringing the second transition factor reference to his attention. (T. 225- 26.)

95. The Sixth draft is dated 6/25/96. (DX 24 at VZ11505.) Abramowitz noted in his cover letter to the Sixth draft his understanding that "your [Peters'] office will take care of blacklining the document." (*Id.* at VZ11503.) He also noted that "[t]he majority of our changes are self-explanatory or have been previously discussed with you." (*Id.* at VZ11503.)

96. Peters used the Sixth draft to create a final plan document entitled "Bell Atlantic Cash Balance Plan Effective December 31, 1995 (7/6/96 edition)" (DX 18 at VZ1046-1106) (the "1996 Plan"). AG ¶41. Peters finalized the 1996 Plan at his office in Bell Atlantic's corporate headquarters in Philadelphia, Pennsylvania, on July 6, 1996. (DX 56 at 149.)

97. In the 1996 Plan, Appendix B of the Sixth draft was moved to a new § 16, entitled December 31, 1995 Transition Plan, but § 16.5.1(a)(2) of the 1996 Plan is substantially the same as Section 3.2.1(a)(2) of Appendix B of the Sixth draft. (T. 135-36.)

98. The final, adopted version of §§ 16.5.1(a)(1) and (a)(2) state:

> **16.5.1(a)(1) If Eligible for Service Pension** If, as of December 31, 1995, the Participant was eligible for a Normal Retirement Service Pension or an Early Retirement Service Pension under the 1995 BAMPP Plan, then the amount described in this paragraph (1) is the product of

multiplying (A) the Participant's applicable Transition Factor described in Table 2 of this Section, *times* (B) the lump-sum cashout value of the immediate annuity benefit under the 1995 BAMPP Plan, determined as if the Participant had retired on December 31, 1995, ignoring any compensation paid after the date of the last paycheck for salary earned in December 1995. For a 1995 Former Active Participant, the date on which the individual ceased to be an Eligible Employee shall be substituted for December 31, 1995 in the last phrase of the previous sentence.

16.5.1(a)(2) Not Eligible for Service Pension In the case of a Participant who is not eligible for a Service Pension under the 1995 BAMPP Plan as of the Transition Date, the amount described in this paragraph (2) is the **product of multiplying (A) the Participant's applicable Transition Factor described in Table 1 of this Section, *times* (B) the lump-sum cashout value of the Accrued Benefit payable at age 65 under the 1995 BAMPP Plan**, determined as if the Participant had a Severance From Service Date on December 31, 1995, based on Compensation paid through December 31, 1995, **multiplied by the applicable transition factor described in Table 1 of this Section.** For a 1995 Former Active Participant, the date on which the individual ceased to be an Eligible Employee shall be substituted for December 31, 1995 in the last phrase of the previous sentence.

(DX 18 at VZ1100) (emphasis added). This was a key provision for anyone who had an opening cash balance.

(T. 236.) According to Abramowitz, this provision on a scale of 1 to 10 ranks as a 10 in terms of importance. (*Id.*)

99. In practice, the CEBC and the HRC never reviewed plan documents to ensure they were consistent with Bell Atlantic's intent. (DX 57 at 17-18.) It was primarily Peters' responsibility to ensure that final plan documents were consistent with Bell Atlantic's intent. (*Id.* at 18.) Bell Atlantic did not have a practice of executing its final plan documents. (DX 56 at 65–66.) In other words, no one ever signed the plan document when it was finalized. (*Id.*) Instead, Peters was delegated the task of deciding when a plan document was final. (*Id.*) Peters finalized the 1996 Plan document on July 6, 1996 pursuant to a grant of authority given to him by the HRC and Bell Atlantic's Vice President – Human Resources. (*Id.* at 57, 65–66.) AG ¶ 45.

100. Mercer did not review the final 1996 Plan document. (DX 54 at 87.) Peters never asked Mercer to review his work on the Cash Balance Plan after he generated the Fourth draft. (DX 57 at 20-22.) AG ¶ 48. Peters did request Susan McLanin to ask Kwasha Lipton to review the Plan "to confirm that it stated how the plan was being administered." (T. 125-26.) He is not certain that it happened. (T. 131-32.) Abramowitz has no recollection of seeing a second reference to the transtion factor in the 1996 or 1997 Plans. (T. 218-19.)

101. April 1996 was also the time when Peters and his wife had set aside to vacation in China. (T. 128-29; DX 56 at 160–61.) Peters went to China for four weeks, but he did not assign anyone to take over

his responsibilities with respect to the Bell Atlantic cash balance conversion while he was in China. (*Id.*) AG ¶ 47.

102. The Cash Balance Plan was not negotiated at arms-length between multiple parties. (DX 56 at 66-67.) AG ¶ 49.

N. *Corcoran* Litigation.

103. A putative class action lawsuit entitled *Corcoran v. Bell Atlantic Corp.*, No. 97-cv-510 (E.D. Pa.), was filed against Bell Atlantic Corporation, the Bell Atlantic Management Pension Plan, and the Bell Atlantic Cash Balance Plan, among others, on January 23, 1997. AG ¶ 52. In Count II of the amended complaint in *Corcoran*, plaintiffs alleged that Bell Atlantic violated its fiduciary duty by adopting the new Cash Balance Plan which (1) did not use a four-year age set-back for its mortality assumptions, and (2) used a PBGC interest rate for September 1995, rather than December 1995, in calculating opening balances. (PX 475 at VZ22890.) The district court did not reach the merits, but dismissed the claim because the decisions did not have fiduciary ramifications. (*Id.*) The Third Circuit affirmed, holding that the opening cash balance assumptions constituted "a design function and non-fiduciary in light of *Lockheed* [*Corp. v. Spink*, 517 U.S. 882, 890 (1996)."] (*Id.* at VZ22891.)

104. The only record of anyone noticing the erroneous second reference to the transition factor in § 16.5.1(a)(2) is footnote 2 in a brief filed by the plaintiffs in the *Corcoran* case which reads as follows:

> By its terms, Section 16.5.1(a)(2) appears to require that participants whose cash balance account was calculated on the basis of their deferred vested pension under the Management Pension Plan receive their transition multiplier twice. Literal application of this provision would be highly advantageous to those Plaintiffs and class members who had their opening account balance calculated on the basis of the deferred vested pension. For example, under a literal application of this provision, plaintiff Pierce, who was assigned a transition multiplier of 2.928, would receive an opening account balance of 5.8 times the lump-sum cash-out value of his pension rights under the Management Pension Plan. However, given the overall context of the Plan document, **Plaintiffs assume that this represents a scrivener's error.**

(DX 37 at VZ22557-58.) (Emphasis added.)

For these six *Corcoran* plaintiffs, the potential advantage of multiplying the transition factors twice would be an aggregate increase in the operating balances of approximately $2 million, from $1.1 million to $3.1 million. (DX62.) The *Corcoran* plaintiffs and their counsel acknowledged in the footnote, however, that the Plan document contains "a scrivener's error" and they expected to receive no more than the opening balance resulting from multiplying the participant's lump-sum cashout value by the transition factor only once. (DX37 at VZ22558.)

105. Bell Atlantic hired Morgan Lewis to defend the Corcoran litigation. Abramowitz was the billing attorney at Morgan Lewis for all Bell Atlantic benefit

matters, including the *Corcoran* litigation. (DX 56 at 227–29; Peters Dep. Ex. 15.) AG ¶ 53.

106. On June 17, 1997, Bell Atlantic moved to dismiss the *Corcoran* complaint for failure to state a claim. AG ¶ 54.

107. The *Corcoran* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, which contained the footnote referenced above, was served on Michael L. Banks, Bell Atlantic's attorney at Morgan Lewis, in Philadelphia, Pennsylvania, by hand delivery on August 6, 1997. AG ¶ 55.

108. On or about August 8, 1997, Peters, Abramowitz, and Morgan Lewis attorneys Steven Spencer, Richard Rosenblatt, and Erin Mulhollan, received the Plaintiffs' Memorandum of Law in Opposition to the Motion to Dismiss. (DX 56 at 174–75; VZ24230.) AG ¶ 56. Abramowitz received and reviewed the brief; he probably read footnote 2, but he has no specific recollection. (T. 217-18, 251.) In his cover letter, Banks asks Peters to review the memorandum and to call him to discuss it. (PX 246 at VZ24230.) Peters denies he read a footnote because, as the scrivener, "bells would have gone off for me," and he would have taken action, including notifying the chair of the benefits committee and his human resources department clients, and he would have corrected the error. (T. 171-72, 177; DX 56 at 181.) Peters claims that he first learned of the mistake several years ago during the course of this litigation when he was contacted by a Morgan Lewis paralegal. (T. 112-13.)

109. On August 22, 1997, Bell Atlantic filed a reply brief in response to the Plaintiffs' Memorandum

of Law in Opposition to the Motion to Dismiss. (VZ23309-32.) AG ¶ 57.

110. Bell Atlantic prevailed on its motion to dismiss. *Corcoran v. Bell Atlantic Corp.*, No. 97-510, 1997 WL 602859 (E.D. Pa. Sept. 23, 1997). AG ¶ 58.

111. The *Corcoran* plaintiffs appealed the decision to the Third Circuit Court of Appeals. AG ¶ 59.

112. Bell Atlantic's attorneys at Morgan Lewis forwarded a copy of the plaintiffs' brief filed with the Third Circuit to Peters on or about February 24, 1998. AG ¶ 60.

113. On June 30, 1998, the Third Circuit affirmed the decision of the district court. (PX 475 at VZ22883-93.) AG ¶ 61.

114. It was Bell Atlantic's practice in 1997 to allow Peters to correct discovered errors in the text of the final plan documents. (T. 174; DX 56 at 181-84.) Bell Atlantic's practice was not necessarily to formally amend or notify participants regarding a discovered alleged drafting error. (*Id.* at 181-84, 190-91.)

O. The 1997 Plan Amendment.

115. Defendants knew or should have known of the existence of the drafting error in Plan § 16.5.1(a)(2) in early or mid-August, 1997. No corrective action was taken at that time.

116. On September 3, 1997, the Cash Balance Plan was restated in a document entitled "Bell Atlantic Cash Balance Plan Effective December 31, 1995 (9/3/97

edition)" (the "1997 Plan"). (VZ13856.) The 1997 Plan contains a second reference to the transition factor in the opening balance formula for non-Service Pension eligible employees. (*Id.*) The 1997 Plan was finalized by Peters. (DX 56 at 196–97.) AG ¶ 62. Section 16.5.1(a)(2) of the 1997 Plan is identical to § 16.5.1(a)(2) of the 1996 Plan. Both contain a second reference to the transition factor.

117. The September 1997 restatement incorporated a single amendment clarifying the Plan's anti-cutback provision that was adopted in response to the *Corcoran* litigation. (DX 79 at VZ14925-29.) The amendment was drafted and reviewed by Peters and Morgan Lewis, and was authorized by the CEBC on June 26, 1997. (PX 276 at MLB372-78; DX 79 at VZ14928.) AG ¶ 63.

118. Drafting of the 1997 Plan began sometime around February 3, 1997, when Morgan Lewis became involved in the drafting process. (PX 279 at MLB2041.) Peters and Morgan Lewis worked on drafting and reviewing the 1997 Plan during the summer and fall of 1997. (DX56 at 77.)

P. Submission of the Plan to the IRS.

119. On November 24, 1997, Bell Atlantic formally submitted the 1996 Plan to the IRS for a favorable determination of its tax-advantaged status. (VZ21386–492.) AG ¶ 64.

120. The submission included a copy of the 1996 Plan and the 1997 Plan amendment. (T. 136; VZ21387; VZ21417–77.) AG ¶ 65.

121. On March 26, 1998, the IRS made a favorable determination of tax-exempt qualification of the Cash Balance Plan. (PX 285 at HA420–21.) AG ¶ 66. That determination included both the 1996 Plan and the 1997 Plan. (PX 285 at HA 420.)

Q. NYNEX Merger and Bell Atlantic-North Plan.

122. The negotiations over the NYNEX/Bell Atlantic merger began just a few months before April 1996, and a key point in the negotiations was occurring in April 1996, at the same time as Peters worked to complete the fourth draft of the Plan. (DX 56 at 160.) Additionally, Peters was responsible at this time for researching all of the potential employment agreements with NYNEX and Bell Atlantic executives to ensure synergies from the merger. (*Id.* at 160–61.) Furthermore, Bell Atlantic's Human Resources Department, which was charged with administering dozens of Bell Atlantic pension plans, was due to lose a number of jobs at the combined entity, and Peters was also at this time very concerned and active in the process of determining how to retain institutional knowledge of the various NYNEX and Bell Atlantic benefit plans after the merger. (*Id.*) AG ¶ 46.

123. Bell Atlantic merged with NYNEX effective August 14, 1997. (DX50) AG ¶ 67. The merger began with negotiations early in 1996, culminating in a merger agreement in the first half of 1996, and finally closed as a merger in August, 1997. (T. 108.) In September 1997 Bell Atlantic's CEBC adopted a resolution authorizing the amendment of the NYNEX Management Pension Plan ("NYNEX Plan") to provide for a cash balance formula ("Bell Atlantic-North Plan" or "BA-North Plan") for salaried employees formerly

with NYNEX. (DX26.) AG ¶ 68. In other words, the NYNEX Plan would be amended and become the Bell-Atlantic North Plan. The CEBC resolution stated that one purpose of the amendment was "conforming the design of the BA-North Plan to the benefit design approved by this Committee in 1995 for the Bell Atlantic Cash Balance Plan." (*Id.* at VZ13469.) The Human Resources Committee of Bell Atlantic's Board of Directors adopted a parallel amendment on September 5, 1997, stating that the BA-North Cash Balance Plan was to be "substantially identical" to the Bell Atlantic (South) Cash Balance Plan, "including without limitation . . . to provide for a reasonable methodology for a one-time transition from the [NYNEX Plan's] prior benefit design to an opening account balance ...." (DX27 at VZ13472; DX57 at 37.)

124. Outside counsel, Morgan, Lewis & Bockius LLP, drafted the BA-North Plan document for Bell Atlantic starting in late 1997 and continuing through the first half of 1998. (DX 56 at 118, DX 57 at 30.) The BA-North Plan was completed in the summer of 1998, and was effective retroactively to December 31, 1997. AG ¶ 69. Peters claims that despite receving black-line copies of the BA-North Plan comparing the document to the Cash Balance Plan, he did not see the error in the Cash Balance Plan. (T. 157-59; PX 289.) Somewhere along the line, the reference to the second transition factor was removed from the Cash Balance Plan. (T. 160.)

125. Bell Atlantic sent a number of communications to participants in the NYNEX Plan regarding the conversion to the BA-North Plan. (DX 29, 30.) AG ¶ 70.

126. The final Bell Atlantic-North Plan contains only one reference to the transition factor in the opening balance formula for non-service pension eligible participants. (DX 28, BA-North Plan § 16.5.1(b)(2), at VZ13650.) AG ¶ 71.

R. The 1998 Plan.

127. In preparation for the merger of the plans of Bell Atlantic and BA-North, an amended and restated Bell Atlantic Plan was completed on October 8, 1998 ("1998 Plan"). (DX 31.) The 1998 Plan contained only one reference to the transition factor in its recitation of the opening balance formula for non-Service Pension eligible participants. (DX 31, 1998 Plan, § 16.5.1(b)(2), at VZ11713; DX 57 at 26-28; DX 56 at 103-06, 120-21.) A subsequent 1999 restatement, issued prior to the plan merger, also stated the opening balance formula for non-Service Pension eligible participants using a single transition factor. (DX 32 at VZ11848.) AG ¶ 72. The effective date of the 1998 Plan was January 1, 1998. (DX 31.)

128. Bell Atlantic eliminated the second reference to the transition factor in § 16.5.1(b)(2) of the 1998 Plan (which corresponds to § 16.5.1(a)(2) of the 1997 Plan). (DX31 at VZ11713.) The second reference to the transition factor in § 16.5.1(b)(2) was in an April 22, 1998 draft of the 1998 Plan. (PX 472 at MLB 548; T. 163-64.)

129. Verizon claims it does not know how the second reference to the transition factor was removed from the 1998 Plan. (DX 57 at 24-25.) ("I, neither I [Peters] nor anyone else at Bell Atlantic has any idea how that phrase disappeared from a document draft.")

The Court finds that it was removed intentionally to correct the mistake that appeared in the 1996 and 1997 Plans.

130. Numerous document drafts were created during 1997 and 1998, leading up to the merger of the 1997 Plan with BA-North Plan that would have shown how the second transition factor was removed from the Cash Balance Plan. Those documents were destroyed prior to this litigation being instituted. Verizon has produced all documents still in existence from its law firms, consultants and employees related to the transition factor reference in the 1996, 1997, and 1998 Plans.

131. Bell Atlantic sent communications to NYNEX participants informing them that they would be receiving the same benefits under the North Plan as participants in the 1997 Plan, but no one reviewed the North Plan document to confirm that it mirrored the 1997 Plan document in its benefits calculations. (DX57 at 31–33.)

132. The most important, basic, and fundamental portion of the benefits determination under the Cash Balance Plan, with respect to the Class, was the opening balance formulas contained in §§ 16.5.1(a)(1) and (a)(2). (T. 97, 127, DX57 at 32.)

133. Bell Atlantic never notified the Plan participants of its error in including the second transition factor in § 16.5.1(a)(2) of the 1996 Plan or the 1997 Plan.

134. Bell Atlantic never notified the Plan participants in a participant communication that it

eliminated the second reference to the transition factor in § 16.5.1(b)(2) of the 1998 Plan.

135. Bell Atlantic never notified the Plan participants in a summary of material modifications that it eliminated the second reference to the transition factor in § 16.5.1(b)(2) of the 1998 Plan.

136. Neither Bell Atlantic nor Verizon ever notified the IRS of the elimination of the second reference to the transition factor in § 16.5.1(a)(2) of the Cash Balance Plan in the 1998 Plan document. (DX56 at 111-12.)

S. The Merger of the Bell Atlantic and the Bell Atlantic-North Plans.

137. Bell Atlantic merged the Bell Atlantic Plan and the BA-North Plan on December 31, 1998, and a merged Plan document was completed on December 1, 1999. (DX 33 at VZ11862, VZ11868; DX 80 and VZ15102-03.) AG ¶ 73.

138. The merged 1999 Plan and its 2000 restatement both stated the opening balance formula for non-Service Pension eligible participants using a single transition factor. (DX 33, 34.) AG ¶ 74.

139. In June 1999 and February 2000, Bell Atlantic prepared "HR & You" newsletters. AG ¶ 75.

140. Under the Bell Atlantic-North Plan, opening balances were calculated by multiplying the transition factor once. (DX28, BA-North Plan § 16.5.1(b)(2), at VZ13650.) The Bell Atlantic-North Plan also used the same transition factor tables that Bell Atlantic used in

January 1996. (*Compare* DX18, 1996 Plan Art. 16, at VZ1102-03 *with* DX28, BA-North Plan Art. 16, at VZ13653-54.)

141. Numerous communications to NYNEX Plan participants confirmed that the "substantially identical" provisions of the BA-North Plan required the transition factor to be multiplied only once to calculate each participant's opening balance. (DX29 at VZ13486-92, DX30 at VZ13531-49.)

T. No Other Claims.

142. During the period from January 1, 1996 until Plaintiff filed her claim in August 2006, no participant asserted a claim, either through the Plan's administrative claims process or through litigation, that his or her opening balance should have been calculated by multiplying the lump sum cashout value of his or her BAMPP accrued benefit by the square of the transition factor.

U. Other Verizon Litigation.

143. Between 2003 and 2008, Verizon filed suit against a number of participants seeking repayment of alleged benefit overpayments resulting from administrative errors in calculating benefits under the terms of a Verizon pension plan. AG ¶ 76. (See PX 304-80.)

144. Verizon has also been sued by a number of participants seeking additional benefits from the Plan and other company-sponsored benefit plans. These lawsuits include *Gramm v. Bell Atlantic Mgmt.*, 983 F. Supp. 585 (D.N.J. 1997), *Wagner v. Bell Atlantic Corp.*,

No. 96-113 (W.D. Pa. 1996), and *Todisco v. Verizon Comms. Inc.*, 497 F.3d 95 (1st Cir. 2007). AG ¶ 77.

V. Plaintiff's Assertion of Her Claim.

145. In 2003, Young contacted the National Center for Retirement Benefits ("NCRB") to review her retirement plan and her benefit payment. (DX 58 at 70–78, DX 38, 39.) AG ¶ 78. Plaintiff did so because she thought mistakes might have been made in calculating her pension, particularly with regard to the recording of her compensation. (DX58 at 70-78, DX 38, DX 39.)

146. The NCRB obtained copies of plan documents, including the 1997 restatement of the Plan, which contains the erroneous second reference to the transition factor. (DX40, DX 41, DX25.)

147. On behalf of Young, the NCRB filed an administrative claim on June 9, 2004. (DX 42.) The NCRB argued that Young's benefit should be higher because Bell Atlantic should have used a different discount rate to calculate the lump-sum cashout value (100% – not 120% – of the PBGC rate). (*Id.*) The Verizon Claims Review Unit denied this claim on October 19, 2004. (DX 43.) Young appealed the Claims Review Unit's decision to the Committee on December 6, 2004. (DX 44.) The Committee denied Young's appeal in February 2005. (DX 45.) AG ¶ 79. The initial administrative claim did not include a claim regarding the transition factor. (DX 42.)

148. Plaintiff's counsel filed the initial complaint in this action on December 30, 2005. (Dkt. 1.) In that complaint, Plaintiff challenged only the discount rate

used to calculate her opening balance, arguing that her opening balance should have been larger by $52,000. AG ¶ 80. The complaint quotes § 16.5.1(a)(2), including the second reference to the transition factor, but did not contend that the transition factor should have been multiplied twice. (Dkt. 1 at ¶ 24 and Ex. B, DX 66 at ¶ 3.)

149. On July 26, 2006, Young sought leave to amend the complaint to add a claim relating to the transition factor. (Dkt. 36.) The Court granted the motion in August 2006 but stayed all proceedings to permit Verizon to review the transition factor claim in the administrative process. (Dkt. 43.) AG ¶ 81.

150. The Claims Review Unit denied Plaintiff Young's transition factor claim in a determination letter dated December 8, 2006. (DX 46.) Plaintiff appealed, and in a determination letter dated April 5, 2007, the Committee denied Plaintiff's administrative appeal. (DX 47.) AG ¶ 82. The Committee determined that Bell Atlantic's intent was to provide for a single multiplication by the transition factor, and that the insertion of the second reference to the transition factor in § 16.5.1(a)(2) was "a mistake and cannot be applied to increase Ms. Young's benefits." (DX 47 at VZ15646-48.)

W. Plan Funding.

151. As of January 1, 1996, the market value of the Plan's assets exceeded the present value of the Plan's accrued benefits by approximately $992 million. (PX 396 at VZ20052.) AG ¶ 83.

152. As of January 1, 1998, the last available figures before the merger of the Cash Balance Plan with the BA-North Plan, the market value of the Plan's assets exceeded the present value of the Plan's accrued benefits by approximately $2.3 billion. (PX 425 at Y991.) AG ¶ 84.

153. The Verizon Management Pension Plan ("VMPP") is the result of a number of mergers of previously separate plans, including the BAMPP, the NYNEX Plan, and GTE's defined benefit plan for management employees. (DX 61 at 61.) The VMPP has subsequently undergone several additional spinoffs and divestitures. (*Id.* at 62, 66, 69-70.) AG ¶ 85.

154. As of December 31, 2008, an unaudited Annual Funding Notice prepared by the plan's actuaries pursuant to the Pension Protection Act of 2006 indicated that the market value of the VMPP's assets was approximately $10.1 billion and the market value of the Plan's liabilities was approximately $12.1 billion. (DX 69 at VZ26893.) AG ¶ 86. The Court was not provided up-to-date information as of the date of closing arguments.

X. Plan Administration.

155. Bell Atlantic (and now Verizon) has consistently calculated pension amounts for participants who retired between 1996 and the present who were covered by § 16.5.1(a)(2) using the transition factor only once. AG ¶ 87.

Y. The Financial Impact of Enforcing the Second Transition Factor.

156. The financial impact of enforcing the second transition factor is over $1 billion in additional benefits to the class. (T.261-63.) Document VZ27114-323 represents Verizon's best approximation of the effect of the second transition factor reference on opening balances. (DX62.) The names, dates, transition factors, opening balances and effect of multiplying the transition factor twice are all approximately correct. Applying the transition factor twice would have increased opening balances by $1.67 billion ($1,670,000,000.00) for the 10,808 participants with transition factors greater than 1.000. AG ¶ 88.

157. It is not known to what extent the increase in opening balances would affect the actual benefits these participants would receive, because a number of participants were eligible to receive benefits under alternative formulas and benefit windows that may have provided a higher benefit than the Plan's cash balance formula. AG ¶ 89.

158. Many employees would receive very large, unexpected increases in their opening balances if the transition factor were squared. Delores B., for example, whose salary as of December 31, 1995, was $110,000, had a transition factor of 2.91, based on her age of 47 and her service of 29.33 years. If the transition factor were squared, her opening balance of $431,000 would increase to $1,253,000 – an increase of $822,000. (DX62 at VZ27199.) Likewise, if his 2.70 transition factor were squared, Patrick H. would see an increase in his opening balance of $956,000 – from $563,000 to $1,519,000. (*Id.* at VZ27149.) Similarly, if

the transition factor were squared, Sharon R., Anthony M. and Bruce G. would experience increases in their opening balances of $819,000, $827,000, and $829,000, respectively. (*Id.* at VZ27285, VZ27143, VZ27183.) Over 136 participants would receive unexpected increases in their opening balances of more than $500,000. (DX62.) Nearly 5,800 members of the subclass would receive unexpected increases in their opening balances of more than $100,000. (*Id.*)

159. Squaring the transition factor for employees not eligible for a Service Pension would result in Plaintiff and many members of the subclass receiving benefits as of the transition date that were substantially larger than the benefits received by co-workers of the same age who received the same annual compensation, yet worked more years for Bell Atlantic. (DX62.) In effect, this would penalize many employees for their longer service. It would also violate a fundamental understanding under which Bell Atlantic participants had operated throughout their employment: that each additional year of service resulted in an increase in their retirement benefit, and that the attainment of the years of service and age required for a Service Pension would result in a substantial increase in their benefit. (DX17, BAMPP §§ 4.1-4.3, at VZ109-12; DX1 at VZ10391-94.)

160. Plaintiff was 48 years old and had 27.8 years of Bell Atlantic service as of January 1, 1996. (DX14 at Y811.) The opening balance for a participant with the same age and earnings, but 30 years of service, would have been determined under Plan § 16.5.1(a)(1) because the participant would have been eligible for a Service Pension. (DX 17, BAMPP § 4.3(a), at VZ111; DX18 1996 Plan § 16.5.1(a)(1), at VZ1100.) Not

surprisingly, the participant with the additional 2.2 years of service would have been entitled to the larger benefit, $262,000 vs. $240,812. (DX47 at VZ15648.) But if the transition factor is squared in computing Plaintiff's benefit under § 16.5.1(a)(2), then Plaintiff, with 27.8 years of Bell Atlantic service, would have an opening balance of $640,321 -- far more than the $262,000 earned by the otherwise identical participant with an additional two-plus years of service. (*Id.*) Byron D. is an example of a participant who had three years more service than Plaintiff, was four years older and had a slightly higher rate of pay as of December 31, 1995. (DX62 at VZ27150.) His opening balance of $352,018 was $111,000 more than Plaintiff's opening balance of $240,812. (*Id.*) But if the transition factor is squared, Plaintiff's opening balance would jump ahead of Byron D.'s by nearly $300,000. (*Id.*)

161. Examples of the anomalies produced by squaring the transition factor for employees not eligible for a Service Pension are numerous. Compare, for example, Rose W. and Mary R., who were not eligible for a Service Pension, to Dorothy B., who was older, had more service and was higher paid. (DX 62 at VZ27222, VZ27198, VZ27114.) Because her age and service had already qualified her for a Service Pension as of the date of conversion to the Cash Balance Plan (as well as her higher pay), Dorothy B. received a higher opening balance on January 1, 1995 than Rose W. and Mary R. ($257,000 for Dorothy B., $210,000 for Rose W., and $221,00 for Mary R.) (*Id.*) But if the transition factor is squared ("TFS") for Rose W. and Mary R. (because §16.5.1(a)(2) applies to them) but not for Dorothy B. (§ 16.5.1(a)(1) applies to her), their opening balances would leapfrog far ahead of Dorothy B.'s ($604,000 for Rose W. and $643,00 for Mary R., as

compared to $257,0007 for Dorothy B.) (*Id.*) Rose W. and Mary R. would also leapfrog ahead of numerous other employees whose age, service and 1995 pay were greater than theirs, including the following: (*Id.* at VZ27222, VZ27198, VZ27114, VZ27187, VZ27114.)

162. Plaintiff and many members of the subclass would also receive benefits that exceed the benefits of many employees of NYNEX who expected to receive the same transition benefits as their peers at Bell Atlantic. (DX48 at VZ13511, VZ13514-15.)

Z. Location of Class Members and Activities Giving Rise to This Lawsuit.

163. According to records maintained by the Plan's benefits administrator, approximately 3,743 members of the class reside in the Commonwealth of Pennsylvania, more than live in any other state. (DX 63.) Approximately 20 class members reside in Illinois. (*Id.*) Plaintiff has never lived or worked in the state of Illinois. (DX 58 at 5–17, 53– 55.) AG ¶ 90.

	AGE	SERVICE	1995 SAL-ARY	OPEN-ING BAL-ANCE	OB - TFS
Rose W.	47	29	56,800	210,000	604,000
Mary R.	47	29	57,600	221,000	644,000
Dorothy B.	48	30	61,500	257,000	257,000

	AGE	SERVICE	1995 SAL-ARY	OPEN-ING BAL-ANCE	OB - TFS
Howard M.	50	30	58,500	278,000	278,000
David W.	50	33	61,900	294,00	294,000
Walter M.	55	34	96,000	520,000	520,000

164. During 1995–1998, all of the Morgan Lewis attorneys who worked on the Cash Balance Plan, the in-house lawyers at Bell Atlantic, and the consultants at Mercer were located in Philadelphia, Pennsylvania. (DX 56 at 149.) AG ¶ 91.

165. From July 1996 until at least 2002, the Plan was not administered in Illinois. (DX 64 at Y390; DX 65 at Y695, Y777.) The Plan has been administered in Illinois since sometime after its merger into the VMPP on January 1, 2002. AG ¶ 92.

166. The 1996 and 1997 versions of the Plan both state that "[e]xcept to the extent superseded by ERISA, all questions pertaining to the validity, construction, and operation of the Plan shall be determined in accordance with the laws of the Commonwealth of Pennsylvania." (DX 18, 1996 Plan § 12.5, at VZ1090; DX 25, 1997 Plan § 12.5, at VZ11770.) AG ¶ 93.

III. CONCLUSIONS OF LAW

A. Procedural History.

Plaintiff alleges that Defendants miscalculated her pension benefits under § 16.5.1(a)(2) of the Plan by: 1) calculating her opening balance using 120% of the PBGC rate instead of 100% ("Discount Rate Issue"), and 2) calculating her opening balance by multiplying her lump-sum cashout value by her applicable Transition Factor once instead of twice ("Transition Factor Issue"). Plaintiff's claims are brought under ERISA §§ 502(a)(1)(B) and (a)(3), 29 U.S.C. § 1132(a)(1)(B) and 29 U.S.C. § 1132(a)(3). This Court has jurisdiction over the claims pursuant to ERISA § 502(e), 29 U.S.C. § 1132(e). The parties consented to this Court's jurisdiction pursuant to 28 U.S.C. § 636(c)(1).

At the Phase I trial, this Court applied the deferential "abuse of discretion" standard of review to Defendants' determination to deny Plaintiff benefits under the Plan. *Young v. Verizon's Bell Atlantic Cash Balance Plan*, 575 F.Supp. 2d 892 (N.D. Ill. 2008). As to Plaintiff's Discount Rate claim, the Court upheld Defendants' decision to calculate Plaintiff's opening account balance at 120% of the PBGC rate, instead of 100%, as a reasonable interpretation within Defendants' discretion. *Id.* at 910. As to Plaintiff's Transition Factor claim, the Court found Defendants did abuse their discretion by disregarding "unambiguous" Plan terms requiring the Transition Factor to be multiplied twice in calculating Plaintiff's opening balance–terms that Defendants claim were a "scrivener's error." *Id.* at 918. This Court held that "upon determining the language was a mistake, the

Committee should have sought to reform the plan document in court . . . subject to *de novo* judicial review." *Id.*

Following issuance of the Phase I opinion, Defendants took up the Court's invitation to file a counterclaim for equitable reformation of the Plan's Transition Factor provision in § 16.5.1(a)(2) on theories of scrivener's error and mistake. Dkt. 139. The parties engaged in extensive discovery.

The Court subsequently held a Phase II bench trial, where it considered both the Discount Rate Issue and Transition Factor Issue *de novo*. The Court also heard evidence on Defendants' reformation counterclaim, including the in-court testimony of two witnesses, and received numerous exhibits in evidence, including depositions. Dkt. 186.

B. Statute of Limitations.

Before reaching the merits of the case, the Court must first address Defendants' argument that both of Plaintiff's ERISA benefits claims are barred by the statute of limitations because Plaintiff was "on notice" of the benefit denial in 1998, when she retired and received her lump-sum pension benefits under the Plan. Plaintiff additionally asserts that Defendants' reformation counterclaim is untimely because the limitations period started running in 1996, when the Plan was finalized and approved with the second reference to the Transition Factor.

ERISA does not contain a statute of limitations for suits brought to recover benefits under § 502. *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112

F.3d 869, 873 (7th Cir. 1997). When a federal statute does not provide direction, the court's inquiry is guided by principles of federal common law. *Berger v. AXA Network LLC*, 459 F.3d 804, 808 (7th Cir. 2006). Federal courts generally borrow from either federal or state statutes of limitations, whichever is most consistent with the law and policy underlying the federal cause of action. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355 (1991); *Lumpkin v. Envirodyne Indus., Inc.*, 933 F.2d 449, 465 (7th Cir. 1991).

One of ERISA's fundamental goals is to protect plan participants by requiring plan terms be communicated to them in writing. 29 U.S.C. § 1001(b). In line with that purpose, ERISA actions are authorized under § 502(a) to enforce or recover benefits due under the "terms of the plan." 29 U.S.C. § 1132(a)(1)(B), (a)(3). Thus, characterizing § 502(a) claims as akin to written contract claims for purposes of the applicable statute of limitations is consistent with the underlying purposes of ERISA. In looking for the most compatible statute of limitations for ERISA § 502(a) actions, the Seventh Circuit has repeatedly borrowed from state statutes pertaining to written contracts. *Leister v. Dovetail, Inc.*, 546 F.3d 875, 880 (7th Cir. 2008); *Daill v. Sheet Metal Workers' Local 73 Pension Fund*, 100 F.3d 62, 65 (7th Cir. 1996); *Jenkins v. Local 705 Int'l Brotherhood of Teamsters Pension Plan*, 713 F.2d 247, 253 (7th Cir. 1983).

Once the appropriate limitations period has been determined, the next relevant question is when the limitations period begins to run. While courts borrow from state law to supply a statute of limitations for ERISA § 502 actions, federal common law determines

when the limitations period accrues. *Daill,* 100 F.3d at 65; *Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516, 520 (3d Cir. 2007). Generally, the federal "discovery rule" holds that a claim accrues once the defendant performs the alleged wrongful act and once the plaintiff discovers it. *Tolle v. Caroll Touch, Inc.*, 977 F.2d 1129, 1139 (7th Cir. 1992). However, ERISA-specific concerns may provide for a different accrual date based on the nature of the action involved. *Id.*

Therefore, to determine whether Plaintiff's claims and Defendants' counterclaim are barred, the Court must consider: 1) what limitations period applies; and 2) the accrual date of the claim.

1. Plaintiff's Claims

a. Applicable Limitations Period

The parties raise two possible states whose statute of limitations might apply: Illinois or Pennsylvania. The most analogous Illinois statute of limitations is the ten-year limitations period for suits pertaining to written contracts. 735 ILCS 5/13-206; *Lumpkin*, 933 F.2d 449, 464-65 (7th Cir. 1991). Plaintiff advocates for application of the Illinois statute, as the Plan has been administered here since 2002. On the other hand, Defendants contend that Pennsylvania's four-year limitations period for breach of contract claims should apply. 42 Pa. Cons. Stat. § 5525; *Hahnemann Univ. Hosp. v. All Shore, Inc.*, 514 F.3d 300, 305-06 (3d Cir. 2008). Defendants claim that Pennsylvania was the "hub" of this case during the most relevant time period.

To determine which limitations period applies, the forum state's statute is the "starting point." *Berger v.*

AXA Network LLC, 459 F.3d 804, 813 (7th Cir. 2006). However, if another state has "a limitations period that is more compatible with the federal policies underlying the federal cause of action, that state's limitations law ought to be employed . . . ." *Berger*, 459 F.3d at 813. To decide whether to import another state's statute of limitations, the Seventh Circuit looks to the state with the most "significant connection" to the action. *Id.*

The *Berger* case illustrates the "significant connection" analysis. In *Berger*, a class of insurance agents brought an ERISA action in Illinois, alleging the defendant wrongly deprived them of ERISA benefits by reclassifying them as independent contractors. The reclassification decision was made at the defendant's New York headquarters. And although both of the named plaintiffs resided in the forum state of Illinois, "other members of the class resided in states other than Illinois," leading the court to observe that "Illinois is simply a spoke rather than the hub of this lawsuit." *Id.* Furthermore, the court found it "not entirely irrelevant" that the ERISA plan at issue contained a choice of law provision naming New York as the forum for any non-ERISA disputes, as it spoke to the parties "justified expectations" of where potential litigation would ensue. *Id.* at 813-14. The Seventh Circuit concluded that "New York is the state with the most significant relationship to the parties and to the transaction" and thus it better served the federal policies at issue to displace the Illinois statute of limitations with New York's. *Id.* at 813-14; *see also Jenkins*, 713 F.2d at 251 (court determined Illinois statute of limitations applied because the operative events happened there, including location of plan

administrator, plan headquarters, and plan investment agents).

Under the *Berger* considerations, Pennsylvania law applies in the present case because it is more closely connected to the parties, it was specified in the pension plan, and it was the "hub" of the decisions made relating to Plaintiff's claim. Pennsylvania is where Defendant was headquartered during the time period most relevant to this claim (the 1990s), where the Plan was drafted, and where the most putative Class members (3,743) still live. In addition, Plaintiff never lived or worked in Illinois during the most relevant time periods to the case, and only a handful of Class members (20) currently reside in Illinois. Furthermore, the pension plan in the present case contains a choice of law provision that designates Pennsylvania law to fill in any gaps in the ERISA statute. (PX 231 at VZ1090.)

Therefore, Pennsylvania's four-year statute of limitations will be applied to Plaintiff's claims to recover benefits under ERISA § 502.

b. Accrual of Plaintiff's Claim

It is well established in this Circuit that ERISA § 502(a)(1)(B) benefit claims begin to accrue only after a "clear and unequivocal repudiation of rights under the Pension Plan which has been made known to the beneficiary." *Daill*, 100 F.3d at 66. Defendants argue that Plaintiff's causes of action accrued when she received her lump sum pension payment in February 1998, the time when the alleged underpayment occurred. Plaintiff, on the other hand, argues that no "clear repudiation" occurred until the claims review

committee denied her final appeals on the Discount Rate claim on February 16, 2005 and on the Transition Factor claim on April 5, 2007.

Plaintiff presents the more compelling argument. An ERISA § 502(a)(1)(B) claim accrues at the time benefits are denied. *Tolle*, 977 F.2d at 1139. In this Circuit, an ERISA plaintiff is required to exhaust all administrative remedies before bringing an action challenging a denial of benefits. *Ruttenberg v. U.S. Life Ins. Co.*, 413 F.3d 652, 662 (7th Cir. 2005). Therefore, an ERISA action logically accrues after the final administrative appeal is denied in writing. *Riemma v. Bekins Van Lines Co.*, 1996 WL 99899, at *6 (N.D. Ill. Feb. 29, 1996).

Furthermore, most other circuits addressing the issue have also found that an ERISA claim accrues only when all administrative appeals have been exhausted. *See, e.g., White v. Sun Life Assurance Co. of Canada,* 488 F.3d 240, 246 (4th Cir. 2007); *Hall v. Nat'l Gypsum Co.*, 105 F.3d 225, 230 (5th Cir. 1997); *Stevens v. Employer-Teamsters Council No. 84 Pension Fund*, 979 F.2d 444, 451 (6th Cir. 1992).

Defendants cite a Third Circuit case for the proposition that a "clear repudiation" of ERISA benefits occurs upon the initial denial of benefits. *Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516 (3d Cir. 2007). In *Miller*, the court held that a § 502(a)(1)(B) claim for benefits accrued at the date of the underpayment, because this was the point the plaintiff could be considered "on notice" of the alleged injury. *Miller*, 475 F.3d at 521-22. However, the *Miller* court specifically noted that this approach "diverges from

that of other courts confronting the same issue." *Miller*, 475 F.3d at 523.

This Court declines to follow the Third Circuit's reasoning because the better argument is that Plaintiff's Discount Rate claim accrued in February 2005 and Transition Factor claim accrued in April 2007, following receipt of the respective final administrative denials from Defendants. Those dates represent the "clear and unequivocal repudiation of rights under the Pension Plan which has been made known to the beneficiary." *Daill*, 100 F.3d at 66. This result promotes the ERISA policy of requiring an exhaustion of administrative remedies prior to instituting litigation. *Ruttenberg*, 413 F.3d at 662. Therefore, both of Plaintiff's claims are timely under the four-year Pennsylvania statute of limitations.

2. Defendants' Counterclaim

a. Applicable Limitations Period

The Court applies the above analysis to ascertain the applicable statute of limitations for Defendants' counterclaim. Absent a governing ERISA provision, the Court again looks to the most analogous state statute. For the reasons set forth above, the Court will borrow from Pennsylvania law, which applies the four-year statute of limitations for contract claims in suits for reformation. *Bowes v. Travelers Ins. Co.*, 173 F. Supp. 2d 342, 346 (E.D. Pa. 2001).

b. Accrual of Defendants' Counterclaim

While the four-year period provided by Pennsylvania state law applies, the Court must look to

federal law to determine the accrual date for an ERISA reformation counterclaim. *Barry Aviation Inc. v. Land O'Lakes Mun. Airport Comm'n*, 377 F.3d 682, 688 (7th Cir. 2004). The parties assert two alternative theories–Plaintiff contends the limitations period began running in 1996, when Defendants published the Plan with the mistake, and Defendants argue the limitations period began when Plaintiff raised the mistake in the present action.

Under Pennsylvania law, a suit for reformation accrues at the time the error is committed, regardless of whether the parties had knowledge of the mistake. *Firestone & Parson, Inc. v. Union League of Philadelphia*, 672 F. Supp. 819, 822 (E.D. Pa. 1987). However, this rule is in conflict with the federal "discovery rule," which provides that a statute of limitations begins to run when a claimant knew or should have known of the facts giving rise to the cause of action. *Barry*, 377 F.3d at 688. In a reformation claim, the discovery rule means that "where the parties, by their actions, consistently construe a contract in a manner that conflicts with its plain meaning, the time to seek reformation does not begin to run until one of the parties repudiates the past construction and elects to rely on the plain meaning of the contract terms." *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1549 n. 13 (9th Cir. 1990). Even if a party is negligent in failing to discover its mistake, mere negligence is not a bar to reformation. Restatement (Second) of Contracts § 508 (1981); *Olivas v. ITT Hartford Life and Annuity Ins. Co.*, 1995 WL 349855, at *2 (9th Cir. June 9, 1995) (failure to discover clerical error in contract did not bar reformation).

Here, Defendants consistently paid out benefits under the Plan using a one-time multiplication of the applicable Transition Factor. The Plan beneficiaries, including Plaintiff, accepted these benefits without complaint about the Transition Factor calculation until 2006, when Plaintiff amended her complaint in the present action. While the error was brought to Defendants' attention in 1997 in a footnote of the *Corcoran* brief, the plaintiffs in that case did not raise a claim against Defendants for a different interpretation of the Transition Factor provision. Thus, while Defendants were arguably negligent for failing to "discover" the error in 1997, it was not enough to have started the limitations period running, because the *Corcoran* plaintiffs did not repudiate the past course of dealing. Therefore, the Court concludes that Defendants' reformation counterclaim accrued in 2006, when Plaintiff raised the issue in this action. Therefore, Defendants' counterclaim for reformation is timely under the four-year Pennsylvania statute of limitations.

C. *De Novo* Standard of Review.

Unlike deferential review, where the Court looks to the reasonableness of the Plan administrator's decision, the *de novo* standard requires the Court to review the case with a fresh eye. In fact, the Court is not technically "reviewing" any decision, but rather making its own independent determination about the merits of the dispute and the employee's entitlement to benefits. *Diaz v. Prudential Ins. Co. of Am.*, 499 F.3d 640, 643 (7th Cir. 2007). The Seventh Circuit put it this way:

> [W]hen *de novo* consideration is appropriate in an ERISA case ... the court can and must come to an independent decision on both the legal and factual issues that form the basis of the claim. What happened before the Plan administrator or ERISA fiduciary is irrelevant. [Cite omitted]. That means that the question before the district court ... was the ultimate question whether [the plaintiff] was entitled to the benefits he sought under the plan.

Id. This Court will now address both issues raised in this case under the *de novo* standard.

D. Discount Rate Issue.

Plaintiff contends Defendants incorrectly calculated her opening account balance because it used an interest rate equal to 120% of the PBGC rate, instead of 100%. Plaintiff argues that because § 16.5.1 provides a formula for determining the "present value," and because § 16.5.1(a)(2) refers to the term "lump-sum cashout value" without re-defining that term, the "lump-sum cashout value" is synonymous with the term "present value." Accordingly, Plaintiff asserts that § 16.5.1 governs how to determine that lump-sum cashout value, which uses 100% of the PBGC rate when determining the opening account balance.

Defendants, however, interpret "lump-sum cashout value" as not being synonymous with the term "present value" as stated in § 16.5.1. Rather, Defendants assert the "lump-sum cashout value" is to be determined by a formula under the 1995 BAMPP Plan, and thus uses the formula under § 4.19 of the 1995 BAMPP calling for a calculation of 120% of the PBGC rate.

Although the Court will review Plaintiff's Discount Rate claim *de novo* for the sake of thoroughly addressing all issues for possible appellate review, the Court concludes this issue was properly within Defendants' discretion. *See Young*, 575 F. Supp. 2d at 905-12. When a plan administrator has discretion, the Court reviews its decision under an "abuse of discretion" standard to determine whether it was reasonable. *Metro. Life Ins. Co. v. Glenn*, --- U.S. ---,---, 128 S. Ct. 2343, 2348 (2008). In Phase I, the Court held Defendants' interpretation of the Plan language to mean that the lump-sum cashout value is to be determined under the formula stated in the 1995 BAMPP Plan was reasonable. *Young*, 575 F. Supp. 2d at 910. Therefore, the issue was appropriately decided in Phase I under the deferential standard of review.

1. *De Novo* Review of Discount Rate Issue

Applying the *de novo* standard, the Court concludes that Defendants correctly used 120% of the PBGC rate pursuant to § 4.19 of the 1995 BAMPP, instead of 100%, in determining Plaintiff's opening account balance. The Court first looks to the provision of the Plan governing Plaintiff's benefits, which indicates that the lump-sum cashout value is to be determined under the 1995 BAMPP methodology. Specifically, § 16.5.1(a)(2) states that:

> [i]n the case of a Participant who is not eligible for a Service Pension under the 1995 BAMPP Plan as of the Transition Date, the amount described in this paragraph (2) is the product of multiplying (A) the Participant's applicable Transition Fact described in Table 1 of this Section, *times* (B) the lump-sum cashout value

> of the Accrued Benefit payable at age 65 *under the 1995 BAMPP Plan, determined as if the Participant had a Severance From Service Date on December 31, 1995, based on Compensation paid through December 31, 1995.*

(PX 231 at VZ 1100) (emphasis added).) The 1995 BAMPP Plan was attached as Appendix A to the 1996 Plan. Under § 4.19(c)(2)(C) of the BAMPP, "[i]f the Acturarial Equivalent present value of the pension using the 'applicable interest rate' (as defined in (c)) does exceed $25,000, 120% of the applicable interest rate" was to be used. (DX 17 at VZ 134.) An ERISA plan may incorporate terms and provisions from a predecessor plan, including provisions that "expired" before adoption of the current plan. *Young*, 575 F. Supp. 2d at 911.

Furthermore, Bell Atlantic communicated to the plan participants that it would continue to use the "same conversion method used in calculating a cashout payment under the old plan." (DX 1 at VZ 10392.) Specifically, Estimated Opening Account Balance Statements sent to participants explained that "[y]our accrued benefit is converted to a lump-sum value applying the same method used today to determine lump-sum cashouts and is based on the PBGC interest rate of 5%." (DX 11 at VZ 10476.) For participants with cashout balances over $25,000, that meant that 120% of the rate structure was used. Bell Atlantic consistently applied 120% of the rate structure to balances over $25,000 under the Plan. Restatements of the Plan beginning in 1998 were amended to explicitly state that 120% of the applicable PBGC rate is to be used for this type of participant. Given these

considerations, Defendants properly used 120% of the PBGC rate to calculate Plaintiff's opening balance.

2. Defendants Are Not Judicially Estopped From Asserting That § 4.19 of the BAMPP Applies

Plaintiff asserts that Defendants are judicially estopped from arguing that § 4.19 of the BAMPP controls present value calculations under § 16.5.1(a) of the Plan, claiming they took an inconsistent position in *Corcoran v. Bell Atl. Corp.* The *Corcoran* litigation commenced in 1997 and challenged the Discount Rate calculation in determining participants' opening balances when the BAMPP converted to the Cash Balance Plan. The *Corcoran* plaintiffs alleged that December 1995 PBGC rates should have been used in the calculation, while Defendants argued they properly applied September 1995 PBGC rates.

Judicial estoppel provides that a party who prevails on one factual or legal ground in a lawsuit cannot later repudiate that ground in subsequent litigation based on the same underlying facts. *Urbania v. Cent. States, S.E. & S.W. Areas Pension Fund*, 421 F.3d 580, 589 (7th Cir. 2005). For judicial estoppel to apply, three requirements must be met: 1) the latter position must be clearly inconsistent with the earlier position; 2) the facts at issue must be the same in both cases; and 3) the party to be estopped must have prevailed upon the first court to adopt the position. *Id.*

Here, the third element of judicial estoppel is clearly not met. The district court in *Corcoran* dismissed the plaintiffs' breach of fiduciary duty claim on the grounds that the claim failed to implicate any

fiduciary duty. *Corcoran v. Bell Atl. Corp.*, 1997 WL 602859, at *8-9 (E.D. Pa. Sept. 23, 1997). The Third Circuit affirmed on the same grounds. *Corcoran v. Bell Atl. Corp.*, 159 F.3d 1350 (Table) (3d Cir. 1998) (full text at PX 475). Thus, the courts never reached the issue of the correct Discount Rate calculation, and Defendants did not "prevail" on any argument related to the interpretation of § 16.5.1(a).

Furthermore, the position Defendants took in the *Corcoran* litigation was not clearly inconsistent with their position here. In *Corcoran*, the parties did not dispute the application of the 120%/100% PBGC rate structure in calculating opening balances under the Plan. The dispute was whether the calculation should have been based on the PBGC rate for September or December 1995. In fact, in *Corcoran*, Defendants asserted to the trial court that "the actuarial assumptions that were adopted as part of the 1995 amendment [adopted by the Human Resources Committee of the Bell Atlantic Board of Directors in October 1995 to establish the new Cash Balance Plan] were determined using the same methodology that was already in place in 1994 and 1995" under § 4.19 of the BAMPP. (DX 76 at VZ23692-93.) This argument was reiterated by Defendants on appeal. (PX 243 at VZ22945.) Defendants take the same position before this Court. Accordingly, Plaintiff's judicial estoppel argument is rejected.

E. Transition Factor Issue – Defendants' Counterclaim for Reformation.

Plaintiff additionally claims she was wrongly denied benefits because Defendants incorrectly calculated her opening balance formula by multiplying

her lump-sum cashout value only once by her applicable Transition Factor. Plaintiff argues that § 16.5.1(a)(2) requires Defendants to multiply her Transition Factor twice. Defendants contend the language in § 16.5.1(a)(2) calling for a second multiplication of the Transition Factor was a mistake due to a "scrivener's error," and call upon the Court to reform it to eliminate the second reference to the Transition Factor, shown below in bold:

> **16.5.1(a)(2) Not Eligible for Service Pension** In the case of a Participant who is not eligible for a Service Pension under the 1995 BAMPP Plan as of the Transition Date, the amount described in this paragraph (2) is the product of multiplying (A) the Participant's applicable Transition Factor described in Table 1 of this Section, *times* (B) the lump-sum cashout value of the Accrued Benefit payable at age 65 under the 1995 BAMPP Plan, determined as if the Participant had a Severance From Service Date on December 31, 1995, based on Compensation paid through December 31, 1995, **multiplied by the applicable transition factor described in Table 1 of this Section**. For a 1995 Former Active Participant, the date on which the individual ceased to be an Eligible Employee shall be substituted for December 31, 1995 in the last phrase of the previous sentence.

1. Reformation of an ERISA Plan Under § 502(a)(3)

Plaintiff argues reformation is not a form of relief authorized by ERISA § 502(a)(3), which provides that an ERISA fiduciary may bring a civil action: "(A) to

enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain *other appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. 1132(a)(3) (emphasis added). For this Court's jurisdiction to be "secure," Defendants' counterclaim for equitable relief under ERISA must be appropriate under § 502(a)(3). *See Gutta v. Standard Select Trust Ins. Plans*, 530 F.3d 614, 620 (7th Cir. 2008); *see also Harris Trust and Sav. Bank v. Provident Life and Acc. Ins. Co.*, 57 F.3d 608, 615 (7th Cir. 1995) (counterclaim for restitution and unjust enrichment constitute appropriate equitable relief under § 502(a)(3)).

a. The Supreme Court's Definition of "Appropriate Equitable Relief"

The text of ERISA does not specifically delineate what constitutes "appropriate equitable relief" under § 502(a)(3), but several Supreme Court opinions have addressed the issue. In *Mertens v. Hewitt Associates*, the Court narrowly construed § 502(a)(3), stating that "[e]quitable relief must mean *something* less than *all* relief." 508 U.S. 248, 259 n. 8 (1993) (emphasis in original). The Court based this assertion on the distinction between classic legal relief and "those categories of relief that were *typically* available in equity (such as injunction, mandamus and restitution, but not compensatory damages)." *Id.* at 256 (emphasis in original). The court held the plaintiff's claim for compensatory damages was precluded as a "classic" form of legal relief not authorized by § 502(a)(3). *Id.* at 255.

In *Great-West Life & Annuity Ins. Co. v. Knudson*, the Court determined that a plan administrator's restitution action was not "appropriate equitable relief" when it sought reimbursement for benefit overpayment from a claimant from unidentified funds. 534 U.S. 204 (2002). The Court once again defined "equitable relief" under § 502(a)(3) as "those categories of relief that were *typically* available in equity." *Id.* at 210 (emphasis in original). Although the *Great-West* Court stated that restitution was typical equitable relief, it nonetheless denied the plan administrator's claim, noting that "not all relief falling under the rubric of restitution is available in equity." *Id.* at 212. Since the plaintiff sought to impose personal liability for a contractual obligation to pay money, the Court characterized its request as an action at law and therefore unavailable under § 502(a)(3). *Id.* at 220-21.

However, when presented with a set of facts where the funds sought were separate, identifiable, and in the defendant's possession, the Supreme Court held § 502(a)(3) authorized the plaintiff's restitution action because it was an equitable lien on particular property and therefore a traditional form of equitable relief. *Sereboff v. Mid Atl. Med. Servs.*, 547 U.S. 356, 363 (2006). Once again, the Supreme Court interpreted § 502(a)(3) to authorize only "those categories of relief that were *typically* available in equity." *Id.* at 361 (emphasis in original).

b. Reformation Is "Appropriate Equitable Relief" Under § 502(a)(3)

Defendants' request for reformation is entirely consistent with the *Mertens* rationale because reformation is "most decidedly a remedy available *in a*

court of equity." Blackshear v. Reliance Standard Life Ins. Co., 509 F.3d 634, 642 (4th Cir. 2007) (emphasis in original). Generally, the doctrine of reformation is available in cases where parties to a contract reached a valid agreement, but the agreed-upon understanding was not properly conveyed in writing. 27 Richard A. Lord, *Williston on Contracts*, § 70:21 (4th ed.). This is sometimes due to a "scrivener's error" on the part of the drafting party. Restatement (Second) of Contracts § 155 (1981). When a court finds by clear and convincing evidence that the written instrument does not reflect the agreed understanding, it may reform the document. *Patton v. Mid-Continent Sys.*, 841 F.2d 742, 746 (7th Cir. 1988).

Before the merger of courts of law and equity, reformation was a traditional equitable remedy. *See William Cramp & Sons Ship & Engine Bldg. Co. v. United States*, 239 U.S. 221, 233 (1915) (well established principles of equity jurisprudence requires reformation where mutual mistake is shown); *Hearne v. Marine Ins. Co.*, 87 U.S. 488, 490 (1874) ("the reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction"); 2 D. Dobbs, *Law of Remedies*, § 11.6(3), p. 751 (2d ed. 1993) ("Reformation is historically an equitable remedy, not a legal one.").

The Seventh Circuit clearly opened the door for reformation of an ERISA plan in circumstances similar to the present case. *Filipowicz v. Am. Stores Benefit Plans Comm.*, 56 F.3d 807, 814 n.3 (7th Cir. 1995). In *Filipowicz*, a summary plan description limited certain insurance benefits to twelve months, while the group insurance plan itself was silent on the issue of how long benefits would last. This was due to an admitted

drafting error. While not allowing the defendants to unilaterally alter the unambiguous language in the plan, the court specifically noted that "[e]vidence that the written contract did not conform to the parties' intent would be relevant for a theory of mutual mistake and a request for reformation . . . ." 56 F.3d at 814 n.3. Other Seventh Circuit cases have also recognized the availability of reformation as a form of relief available under ERISA. *Johnson v. Allsteel, Inc.*, 259 F.3d 885, 890 (7th Cir. 2001) (claim for reformation of an ERISA plan allowed to proceed); *Grun v. Pneumo Abex Corp.*, 163 F.3d 411, 421 (7th Cir. 1998) (where there is mutual mistake in the formation of a contract the court can disregard unambiguous words); *see also Board of Tr. of U. of Ill. v. Ins. Corp. of Ireland, Ltd.*, 969 F.2d 329, 332 (7th Cir. 1992) (insurance contracts may be reformed when clear and convincing evidence compels the conclusion that the writing does not properly reflect true intentions of parties due to mutual mistake) (applying Illinois law).

Courts in other circuits have also expressly stated that reformation is "appropriate equitable relief" under § 502(a)(3) pursuant to the Supreme Court's guidance in *Mertens, Great-West, and Sereboff*. *See Ross v. Rail Car Am. Group Disability Income Plan*, 285 F.3d 735, 741 (8th Cir. 2001) (participant's claim for equitable reformation arises under § 502(a)(3) in light of *Great-West*); *Nechis v. Oxford Health Plans*, 421 F.3d 96, 103 (2d Cir. 2005) (reformation for mutual mistake would be appropriate for § 502(a)(3) claim); *DePace v. Matsushita Elec. Corp. of Am.*, 257 F. Supp. 2d 543, 566-67 (E.D.N.Y. 2003) (reformation an appropriate equitable remedy under ERISA § 502(a)(3) and consistent with *Great-West* reasoning); *Ramsey v.*

Colonial Life Ins. Co. of Am., 12 F.3d 472, 479-80 (5th Cir. 1994) (court can reform an ERISA-governed policy where both parties are mistaken as to a material aspect of the contract).

Given the above considerations, the Court has jurisdiction over Defendants' counterclaim because reformation falls within the meaning of "appropriate equitable relief" under § 502(a)(3).

2. Factors to Consider in ERISA Plan Reformation

Having determined that Defendants' counterclaim for reformation may proceed, the Court next turns to the applicable principles for ERISA plan reformation. Analyzing Defendants' reformation counterclaim falls within the purview of this Court's power to develop a federal common law of rights and obligations under ERISA-regulated plans. *See Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 110 (1989). In developing the ERISA federal common law, courts generally look to ordinary principles of contract interpretation. *Mathews v. Sears Pension Plan*, 144 F.3d 461, 465 (7th Cir. 1998) (collecting cases). The contract law doctrine of "scrivener's error," or mutual mistake, allows a court of equity to reform a contract where a written agreement does not reflect the clear intent of the parties due to a drafting error. 27 Richard A. Lord, *Williston on Contracts* § 70:93 (4th ed.). The burden is on the party seeking reformation to establish evidence that is "'clear, precise, convincing and of the most satisfactory character' that a mistake has occurred and that the mistake does not reflect the intent of the parties." *Gerlib v. R.R. Donnelley & Sons Co.*, 2002 WL 1285795, at *3 (N.D. Ill. June 11, 2002).

However, the relevant principles of contract law must be customized to the policies of ERISA, and may not be applicable if the general contract law does not fit the ERISA issue at hand. *Mathews*, 144 F.3d at 465. In addition, when, as here, a case involves an ERISA pension plan, "the interpretive principles are also to be tailored to the distinctive characteristics of pension plans." *Id.* Therefore, the Court's reformation analysis must focus on traditional contract principles in light of ERISA-specific concerns.

a. ERISA's "Plan Documents" Rule

Plaintiff argues that Defendants' reformation counterclaim contradicts and is thus barred by ERISA's well-established "plan documents" rule. The plan documents rule, also referred to as ERISA's writing requirement, mandates that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). The written instrument must specify the basis on which payments are made to and from the plan. 29 U.S.C. § 1102(b)(4). ERISA fiduciaries are required to discharge their duties "in accordance with the documents and instruments governing the plan." 29 U.S.C. 1104(a)(1)(D). The rule aims to ensure that "every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) (emphasis in original).

The Supreme Court recently emphasized the importance of the plan documents rule in *Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*, --- U.S. ---,---, 129 S. Ct. 865 (2009). In *Kennedy*, an ERISA

plan participant neglected to change his designated beneficiary as required by the plan, resulting in a windfall to his ex-wife who had unequivocally waived those benefits in a divorce decree. *Id.* at 868-69. ERISA specifically provides that only a Qualified Domestic Relations Order (QDRO) will be binding on employee benefit plans, and the Court found that the divorce decree at issue was not a QDRO and thus not a controlling plan document. *See* 29 U.S.C. § 1056(d)(3). The Court held that "[t]he plan administrator . . . did exactly what [ERISA] required: 'the documents control, and those name the ex-wife.'" 129 S. Ct. at 877.

In so holding, the Supreme Court reasoned that the cost of complicating ERISA's "uncomplicated" bright-line plan documents rule by creating "less certain rules" is too great. *Id.* at 875-76. The rule permits participants to rely upon the plan documents, to avoid unnecessary confusion and the need to endure complicated factual inquiries into "nice expressions of intent," and to "get what's coming quickly" based upon a "clear set of instructions." *Id.* However, the *Kennedy* Court held only that a non-plan document cannot override a plan document. It thus leaves open the question of what to do when a plan document contains a drafting error.

b. Reformation Principles In Light of the Plan Documents Rule

Courts confronting equitable reformation of ERISA plans have noted the tension between the equitable doctrine of reformation of a scrivener's error and the plan documents rule. The Third Circuit acknowledged:

> Allowing the doctrine of scrivener's error to apply in ERISA cases would seem at odds with [the plan documents rule]. A plan document containing a scrivener's error might mislead an employee into believing he had rights or obligations that he did not, in fact, have. If, on the other hand, the employer were bound by the plan documents, whether or not they contained errors, the employee would know precisely his obligations and right upon reading the plans.

Int'l Union v. Murata Erie N. Am., Inc., 980 F.2d 889, 907 (3d Cir. 1992). Despite this potential tension, the *Murata* court found the scrivener's error doctrine to be appropriate in that case. *Id.* On the other hand, under certain circumstances application of the mutual mistake doctrine has been found to be inconsistent with "ERISA's strong preference for the written terms of the plan." *Cinelli v. Security Pac. Corp.*, 61 F.3d 1437, 1445 (9th Cir. 1995) (parol evidence of Board resolution offered to show intent of Board of Directors deemed insufficient for reformation because Board resolution is not a plan document). However, even courts who have declined to grant reformation have not altogether foreclosed the possibility. *See Cinelli*, 61 F.3d at 1445; *Blackshear v. Reliance Standard Life Ins. Co.*, 509 F.3d 634, 642 (4th Cir. 2007); *Cent. Pennsylvania Teamsters Pension Fund v. McCormick Dray Line, Inc.*, 85 F.3d 1098, 1104 (3d Cir. 1996). The Court will now examine the factors courts analyze in deciding whether to grant reformation.

i. Mutual Mistake

The issue of whether to reform a scrivener's error in an ERISA plan turns on the case-specific facts. Where

the mutual understanding of the parties can be established, reformation may be warranted if the plan terms do not reflect that understanding. In *Wilson v. Moog Auto., Inc. Pension Plan*, the Eighth Circuit affirmed reformation where a collectively bargained closing agreement, an acknowledged "plan document," conflicted with the pension plan's actual terms due to a clerical error in the plan. 193 F.3d 1004, 1007-08 (8th Cir. 1999). Because the agreement proved that the intent of the parties was not reflected in the plan itself, reformation was justified. *Id.* at 1008. Similar circumstances occurred in *Murata*, where a collective bargaining agreement (a "plan document") demonstrated the mutual intent of the parties despite the erroneous omission of a provision in the plan itself. The *Murata* court held reformation was appropriate if the parties' intended terms were not reflected in the plan. 980 F.2d at 908.

Courts have also acknowledged the viability of an ERISA reformation claim where communications to participants clearly summarized intended plan terms that were not reflected in the formal plan due to a drafting error. *Rea v. The Hershey Co. 2005 Enhanced Separation Plan*, 2008 WL 2782663, at * 8 (M.D. Pa. July 15, 2008); *Air Line Pilots Ass'n v. Shuttle, Inc.*, 55 F. Supp. 2d 47, 53 (D.D.C. 1999). In *Rea*, the court found that reformation was appropriate where the plan participants received consistent communications describing the plan's terms and where it was unlikely that any plan participant would have relied upon the typo in the plan text. *Id.* In *Air Line Pilots*, a claim for reformation was allowed to proceed to trial on a theory of scrivener's error or mistake where the participants were informed that their new plan would mirror the benefits they had been receiving under an old plan, but

due to editing errors the new plan reflected a markedly increased benefit. 55 F. Supp. at 52-53.

When examining extrinsic evidence in ERISA plan interpretation, such evidence "must be objective." *Mathews*, 144 F.3d at 467. "It must not depend on the credibility of testimony (oral or written) of an interested party." *Id.* In *Mathews*, the court held that treasury regulations, a course of dealing between the parties, and contents of a summary plan description (SPD) were sufficient objective evidence to show that a term of an ERISA plan "doesn't mean what it seems to mean." *Id.* at 468. In that case, the court was looking to parol evidence to establish the understanding among all parties as to the meaning of a seemingly unambiguous plan term. In its analysis of the differences between general contract interpretation and ERISA plan interpretation, the court specifically discounted less reliable forms of evidence such as oral testimony from the plan administrator. *Id.* at 466-67.

When no official "plan document" or other consistent plan communications could have put participants on notice that the plan itself contained an error, courts have barred reformation. In *Blackshear*, the Fourth Circuit determined that reformation was not appropriate where a clerical error had been printed in both the plan *and* the summary plan description ("SPD"). 509 F.3d at 643. When the SPD and the plan agree, "there is utterly no indication of error or mistake." *Id.* at 644. In *Cinelli,*, only a Board resolution, which was not a plan document, was offered as evidence that the plan contained a scrivener's error, while the plan otherwise provided a clear statement of benefits. 61 F.3d at 1445. The Ninth Circuit held that parol evidence of the intent of the Board could not

overcome otherwise consistent terms in the formal plan document to establish mutual mistake. *Id.* Similarly, in *Gerlib*, the court determined that internal company guidelines were insufficient to trump the "unambiguous" plan documents and were not clear and convincing evidence of mutual mistake. 2002 WL 1285795 at *4.

Plaintiff has further raised the issue of whether the alleged drafting error by Defendants can be classified as a "mutual" mistake in the context of a unilaterally drafted ERISA plan. The mutual v. unilateral mistake distinction is an important one in a reformation analysis, as courts have been "reluctant to allow a party to avoid a contract on the ground of [unilateral] mistake, even as to a basic assumption, if the mistake was not shared by the other party." Restatement (Second) of Contracts § 153 cmt. a (1981). In the ERISA context, absent an employee collective bargaining agreement, pension plans are not negotiated by the parties, but are unilaterally conferred and amended by the administrator. *Mathews*, 144 F.3d at 465. Thus, a drafting error by an ERISA plan drafter is only a mutual mistake if the employees were "on notice" of the plan sponsor's actual intent. *Bock v. Computer Assocs. Int'l*, 257 F.3d 700, 710-11 (7th Cir. 2001) (case remanded for trial to determine whether plaintiff knew, or had reason to know, that employer intended to exclude commissions based on plan summary); *see also Grun*, 163 F.3d at 421-22 (no mutual mistake where unambiguous language in severance compensation agreement was consistent with employees' understanding). However, where both the plan sponsor and plan beneficiaries were operating under the same understanding of the sponsor's intent, it is a "mutual" mistake if the plan

does not reflect that understanding. *Murata*, 980 F.2d at 907; *Wilson*, 193 F.3d at 1009 (pension plan amendment reformed to be made consistent with the plant closing agreement); *Air Line Pilots*, 55 F. Supp. 2d at 53-54 (cross motions for summary judgment denied to permit trial on doctrine of scrivener's error).

Whether the parties were "on notice" of the plan sponsor's intent (*e.g.*, whether there was a mutual mistake) is thus the key consideration in determining whether to reform an alleged scrivener's error. Clear and convincing evidence cannot be shown where no clear documentation existed demonstrating what the plan participants understood the plan terms to be. *See Blackshear*, 509 F.3d at 642-43; *Cross v. Bragg*, 2009 WL 2196887, at *7 (4th Cir. July 24, 2009); *Humphrey v. United Way of the Texas Gulf Coast*, 2007 WL 2330933, at *11-12 (S.D. Tex. Aug. 14, 2007). In *Blackshear*, no written evidence existed showing that the plan beneficiaries would have known of an even "obvious" mistake. 509 F.3d at 643. In *Cross* and *Humphrey*, the courts specifically found there could not have been a mutual mistake where evidence was only offered as to the plan sponsor's intent and not the understanding of the plan beneficiaries. 2009 WL 2196887 at *8; 2007 WL 2330933 at *11. However, when an SPD or SMM, along with consistent plan communications, sufficiently put the beneficiaries on notice of the plan sponsor's intent, then a mutual understanding has been reached. *See Air Line Pilots*, 55 F. Supp. 2d at 53-54; *Mathews*, 144 F.3d at 466-67.

ii. Reliance

When there is no evidence that any plan beneficiaries actually relied on an error in the plan,

"ERISA's goal of providing clear Plan documents is . . . less pertinent." *Murata*, 980 F.2d at 907; *see also Rea v. The Hershey Co. 2005 Enhanced Separation Plan*, 2008 WL 2782663, at * 8 (M.D. Pa. July 15, 2008) ("reformation of a plan document does not contravene [the plan documents rule] if a court can determine that it is unlikely that plan participants relied upon the scrivener's error"). In fact, allowing equitable reformation when there has been no reliance on an error reinforces the plan documents rule because it ensures that the plan is accurate. This strengthens ERISA's promise that "every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995).

The Court finds that the question of what the plan participants actually relied upon is probative in the context of an ERISA reformation analysis. The Seventh Circuit found the fact that "[n]obody complained during the period in which the critical language was in the plan" to be crucial evidence that there was no actual reliance on erroneous plan language. *Mathews*, 144 F.3d at 468. In *Murata*, the Third Circuit emphasized the importance of reliance, stating it was a key consideration in determining whether reformation would comport with the plan documents rule. *Murata*, 980 F.2d at 907. The Ninth Circuit also recognized that actual reliance is a determinative factor in the analysis of reformation of a scrivener's error in the ERISA context. *Cinelli*, 61 F.3d at 1445 (finding insufficient evidence of such reliance).

Summary plan descriptions ("SPD") and summaries of material modifications ("SMM") provide key evidence on the reliance question, as they are "what the plan beneficiaries actually read." *Mathews*, 144 F.3d at 466. ERISA requires that plan administrators provide an SPD and SMM written in a manner "calculated to be understood by the average participant." 29 U.S.C. §§ 1022(a), 1024(b)(1). SPDs and SMMs are plan documents. 29 U.S.C. § 1024(b)(2), (b)(4); *Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*, --- U.S. ---,---, 129 S. Ct. 865, 877 (2009). In the event an SPD or SMM directly conflicts with the plan text, as it does in the present case, this Circuit has consistently held that the summary controls because it is the document participants read and rely upon. *Helfrich v. Carle Clinic Assoc., P.C.*, 328 F.3d 915, 916 (7th Cir. 2003); *Mers v. Marriott Int'l Group Accidental Death and Dismemberment Plan*, 144 F.3d 1014, 1023 (7th Cir. 1998); *Mathews*, 144 F.3d at 466 ("plan summary generally controls in the case of a conflict with the plan itself . . . ."); *Senkier v. Hartford Life & Acc. Ins. Co.*, 948 F.2d 1050, 1051 (7th Cir. 1991); *cf Perry v. Sheet Metal Workers' Local No. 73 Pension Fund*, No. 08-2024, slip. op. at 11 (7th Cir. Oct. 27, 2009) (plan governs absent contradictory SMM or SPD).

Plaintiff correctly points out that Plan communications in the present case contain the boilerplate disclaimer that the Plan would govern in the event of a conflict between the Plan and any summary descriptions. However, to allow such a disclaimer would essentially nullify ERISA's requirement that plan summaries be "accurate" and "sufficiently comprehensive to reasonably apprise" plan participants of their rights and obligations under

the plan. *Hansen v. Continental Ins. Co*, 940 F.2d 971, 982 (5th Cir. 1991); *Hopkins v. Prudential Ins. Co. of Am.*, 432 F. Supp. 2d 745, 763 (N.D. Ill. 2006) ("In general, a claimant sees the SPD, not the plan, and he makes decisions based on the terms as they are set forth in the SPD."). Therefore, the Court will look to the contents of the SMM and SPD governing the Plan as evidence of what the plan beneficiaries relied upon.

iii. "Course of Dealing" Between the Parties

A long and consistent course of dealing is further objective evidence of a mutually understood agreement. Course of dealing evidence is particularly reliable in contract interpretation because the credibility of such evidence is "not a function of the self-serving testimony of a party to the contract." *Mathews*, 144 F.3d at 466. The history between the parties will demonstrate what they believed their written agreement was, even if a scrivener's error resulted in the actual written terms differing from that understanding. *Murata*, 980 F.2d at 908. The fact that benefits were consistently paid out and accepted over a period of years using the same calculation is strong evidence of a "course of dealing" between an ERISA plan administrator and the plan beneficiaries.

iv. Windfall

A related consideration to the reliance question is whether the results without reformation would be "absurd" or create a windfall to some plan participants. *Murata*, 980 F.2d at 907; *Gerlib*, 2002 WL 1285795, at *3; *Cinelli*, 61 F.3d at 1444 (court considered whether windfall would be created by failing to correct alleged

error); *see generally* Black's Law Dictionary (8th ed. 2004) (defining a "windfall" as "an unanticipated benefit . . . not caused by the recipient"). In *Mathews*, the Seventh Circuit emphasized: "[w]e cannot see how ERISA beneficiaries . . . would be benefitted by the adoption of principles of contractual interpretation so rigid and archaic as to permit the class to reap the pure windfall here sought to the potential prejudice of other beneficiaries." *Mathews* at 469. And as discussed above in *Murata*, the Third Circuit relied on "scrivener's error" in the ERISA context in part because of the unanticipated "windfall" that could result if it rejected reformation. 980 F.2d at 907. There, ERISA's goal of providing clear plan documents was not implicated where neither party foresaw the excess benefit. *Id. See also Air Line Pilots Ass'n v. Shuttle, Inc.*, 55 F. Supp. 2d 47, 53 (D.D.C. 1999) ("When . . . employees would receive a 'windfall' if the plan were not reformed, courts have been more inclined to intervene and change the terms of the plan to reflect the parties' true intent.").

Plaintiff contends Defendants cannot prove a windfall or absurdity, additionally urging such issues are irrelevant. Plaintiff points to a series of cases which stand for the proposition that courts enforce harsh rules, especially in ERISA cases, even when they lead to a windfall. *See, e.g., Schena v. Metro. Life Ret. Plan*, No. 06-16623, 2007 WL 1875644, at *3 (11th Cir. June 29, 2007) (noting the plan documents rule can often lead to harsh results and explaining the rule provides predictability as to the extent of future obligations); *Integrated Health Servs. Brentwood, Inc. v. Commonwealth Edison*, No. 98-0558, 1999 WL 1256255, at *1 (N.D. Ill. Dec. 20, 1999) (same). However, the cases Plaintiff cites relate to oral

modifications and other informal communications made to plan beneficiaries, not summary provisions sent out to employees notifying them of their rights under the plan as was done in the present case.

Furthermore, courts do not look favorably on attempts to obtain windfall recoveries from ERISA plans. *See Harms v. Cavenham Forest Indus., Inc.*, 984 F.2d 686, 693 (5th Cir. 1993) (windfall recoveries are "abhorred by ERISA"); *Henry v. Champlain Entersprises, Inc.* 445 F.3d 610, 624 (2d Cir. 2006) (Sotomayor, J.) (the aim of ERISA is "to make the plaintiffs whole, but not to give them a windfall"). Clearly, the goals of ERISA to protect the rights of plan beneficiaries were not intended to extend to benefits that participants never expected.

v. Additional ERISA Policy Considerations

Defendants additionally set forth the public policy argument that employers, who are under no obligation to offer employee benefit plans, will be discouraged from doing so if not allowed to reform scrivener's errors. Defendants contend that enforcing a term resulting from a mistake or scrivener's error undermines one of ERISA's principal goals–to "protect employees' justified expectations of receiving the benefits their employers promise them." *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 730, 743 (2004). In addition, in order to protect employees' expectations under ERISA plans, the statute requires that plans be adequately funded. 29 U.S.C. § 1001(c). To allow some employees to receive unanticipated and unintended benefits, Defendants argue, would circumvent both of these goals by producing

unpredictable financial consequences and potentially leaving the Plan underfunded.

The Court must consider that an absolute bar on reformation of a drafting error could have the effect of discouraging employers from establishing and maintaining employee benefit plans. The Supreme Court has pointed out that employers are under no obligation to provide employee benefit plans, nor what kind of benefits to provide if they do choose to establish a plan. *Lockheed Corp. vSpink*, 517 U.S. 882, 887 (1996). On one hand, Congress implemented ERISA to ensure that employees' benefits were protected. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). On the other hand, Congress did not desire to create a system that would result in high administrative and litigation costs that could potentially discourage employers from offering plans. *Id.* If errors in plan drafting are to be strictly enforced so as to create a windfall to participants at the unanticipated expense of the plan, it could presumably act as a deterrent to employers from establishing such plans.

3. Given the Above Considerations, Reformation is Justified

Analysis of the Plan under the mutual mistake doctrine is not inconsistent with ERISA's plan documents rule in the present case. Defendants have shown, by objective clear and convincing evidence, that both parties operated under an understanding that the Transition Factor under § 16.5.1(a)(2) would only be multiplied once in determining an employee's opening balance. The phrase calling for a second multiplication was a drafting error. No evidence exists to suggest that any plan participant relied upon the error. In fact, the

course of dealing between Defendants and the plan participants shows that benefits were consistently calculated by multiplying the Transition Factor once. To enforce the erroneous plan provision now would result in an enormous windfall to the Class participants in Subclass 2.

a. Participant Communications

Defendants sent numerous communications to plan participants that clearly and consistently established the Transition Factor would be multiplied only once. The first of these was the brochure sent out to participants in October 1995 entitled "Introducing Your Cash Balance Plan," which constituted the Plan's summary of material modifications (SMM) and was thus a plan document. The SMM was written in a straightforward manner and set forth in simple terms that the opening balance would be calculated pursuant to this formula: OLD PLAN LUM SUM VALUE x TRANSITION MULTIPLIER = OPENING ACCOUNT BALANCE. The SMM also contained specific examples using the single multiplication of the Transition Factor. In letters to plan participants in October 1995, November 1995 and May 1996, Bell Atlantic repeatedly instructed participants to "please be sure to read" and "please refer to" the SMM for an accurate statement of the Plan's opening balance and Transition Factor provisions.

In November 1995, Bell Atlantic sent estimated "opening account balance" statements to BAMPP participants. These statements provided each participant with an estimate of his or her opening balance in the Cash Balance Plan, provided a step-by-step description of the opening balance

formula, and contained a table of the Plan's Transition Factors.

In May 1996, Bell Atlantic provided each participant in the Cash Balance Plan with a customized retirement planning guide, "A Look at Your Future Today: Your Retirement Planning Guide." This guide included a personalized "opening balance" statement setting forth each participant's actual opening balance calculation. These statements explained that each participant's lump sum cash-out value would be multiplied by the applicable Transition Factor only once. Bell Atlantic also sent participants a quarterly statement that, among other information, set forth the participant's current balance in the cash balance plan. By June 30, 1996, Bell Atlantic had completed more than 50,000 separate mailings to participants, each of which made clear that the lump-sum cash out was multiplied by the Transition Factor just once.

b. Other Evidence of Intended Formula

The development and drafting history of the Plan clearly demonstrates that Bell Atlantic only intended to multiply the Transition Factor once. On September 26, 1995, Mercer submitted a memorandum to Bell Atlantic that included a copy of the plan's Transition Factor table and a 15-year projection of liabilities. The projected liabilities were based on the Transition Factor being multiplied once, not twice. Mercer's cover memorandum submitting its final recommendation for the Cash Balance Plan explained that the Transition Factor was to be multiplied only once by the lump cashout value. On September 27, 1995, Mercer sent Coopers & Lybrand the specifications to calculate the

opening balances as of December 31, 1995. Those specifications provided for multiplying the lump-sum cashout value times the Transition Factor only once, not twice.

The Transition Factors in the table attached to Mercer's September 26, 1995 memorandum to Bell Atlantic and its September 27 memorandum to Coopers & Lybrand were the same ones used to calculate the actual opening balances in January 1996 and the same ones contained in the tables attached to the July 1996 Cash Balance Plan. These documents and the related testimony by Moreen, the Mercer Partner in charge of the Bell Atlantic engagement, and Peters, the in-house counsel responsible for drafting the Cash Balance Plan, fully support a finding that Defendants intended to multiply the Transition Factor only once.

Bell Atlantic's Corporate Employee Benefits Committee ("CEBC") adopted a resolution in October 1995 authorizing the transition from the BAMPP to the Cash Balance Plan. The resolution specified that a participant's opening balance in the Plan would equal "the product of the cashout value of the participant's accrued benefit on the Effective Date (determined under the existing rules of BAMPP as of 12/31/95) times a Transition Factor (greater than or equal to 1.0) according to the table presented to this meeting..." The table presented at the meeting was the Transition Factor table submitted by Mercer in September 1995. In November 1995 the Human Resources Committee ("HRC") of Bell Atlantic's Board of Directors approved the amendment of the BAMPP, effective December 31, 1995, to create the Cash Balance Plan.

c. Scrivener's Error

The drafting error caused by Peters in the 1996 Plan was a classic "scrivener's error" that caused the Plan itself to reflect something different than what both parties understood it to mean. The drafting history of the Cash Balance Plan demonstrates by clear and convincing evidence that a mistake was made in the drafting of the restated Plan document by including two references to the Transition Factor in § 16.5.1(a)(2) of the Plan.

Peters was the Bell Atlantic employee responsible for coordinating and steering the plan documentation process. Abramowitz from Morgan Lewis was hired to provide outside legal assistance in the drafting of the Cash Balance Plan. Strella was the head of the document drafting working group on the team Mercer assembled for the Bell Atlantic cash balance conversion. Strella prepared the first three drafts, completing the third in October 1995. The three Mercer drafts express the opening balance formulas for Service Pension eligible and non-Service Pension eligible participants in similar terms, using a single Transition Factor.

Peters prepared Draft 4 of the Cash Balance Plan, dated April 15, 1996. Draft 4 is the first draft of the Plan that contains a second reference to the Transition Factor in the opening balance formula for nonservice pension eligible participants. In Draft 4, Peters edited and reorganized the language in an effort to make the text more clear. He intended to treat those Eligible for Service Pensions and those Not Eligible for Service Pensions the same in describing their opening balance formulas. However, Peters neglected to delete the

"trailing clause" that read "multiplied by the applicable transition factor" at the end of the section relating to those Not Eligible For Service Pensions.

As a result of Peters' mistake, the formula called for the lump-sum cashout value to be multiplied by the Transition Factor twice; rather than once as intended. This mistake went unnoticed despite further drafts and reviews by Abramowitz, and was carried over into the renumbered § 16.5.1(a)(2) in the final version of the 1996 Plan. Peters provided credible testimony at the Phase II trial of his error: "I was always working electronically so that I could share my work more efficiently with both people in my company and elsewhere, and I must not have seen clearly the words that had been left at the end of that paragraph ... It was unfortunately my own mistake by my own hand." (T. 101.)

d. No Reliance

There is no evidence that Plaintiff or any Class member actually relied upon language calling for the Transition Factor to be multiplied twice instead of once. Prior to this litigation, no Class member ever brought a claim that the Transition Factor had been misapplied. In fact, the plaintiffs in the *Corcoran* litigation took specific note of the scrivener's error, but did not assert a claim that they were entitled to greater benefits as a result. Furthermore, Plaintiff never reviewed or relied upon the mistaken language in the Plan. Plaintiff did, on the other hand, produce from her files the communications she received in 1995 and 1996, including the SMM, quarterly statements, Estimated Opening Account Balance Statement, and the "A Look at Your Future Today" booklet. Plaintiff

kept these as "important" documents related to her employment. The documents were all consistent in explaining that the Transition Factor would be multiplied once.

e. Course of Dealing

The course of dealing between the Plan administrator and the Plan participants indicates that benefits were always paid out under the Plan by multiplying the Transition Factors only once. Opening Balances were established for 13,784 plan participants retroactive to January 1, 1996. All of the calculations were performed multiplying the Transition Factor only once. Quarterly statements consistently used this same methodology.

f. Windfall

To allow Plaintiff and the other Class members to receive benefits pursuant to the scrivener's error would create a $1 billion windfall to the Class, including $400,000 to Plaintiff. More than 5,780 participants would receive unanticipated increases in their opening balances of $100,000 or more. Furthermore, squaring the Transition Factor would result in Plaintiff and many members of Subclass 2 receiving benefits substantially larger than those received by co-workers who worked more years for Bell Atlantic, a result clearly not intended by Defendants, nor anticipated by the Class.

F. Plaintiff's Equitable Defenses to Reformation.

Plaintiff contends that even if reformation of the Plan is appropriate due to mutual mistake or

scrivener's error, the Court should still exercise its discretion and deny equitable relief. "Since the remedy of reformation is equitable in nature, a court has the discretion to withhold it, even if it would otherwise be appropriate, on grounds that have traditionally justified courts of equity in withholding relief." Restatement (Second) of Contracts § 155 cmt. d (1981). Plaintiff raises several equitable affirmative defenses she claims should bar reformation: 1) undue delay and laches, 2) inexcusable neglect, 3) acquiescence and ratification, 4) unclean hands, and 5) judicial estoppel. The Court is not persuaded that any or all of these defenses is sufficient to bar reformation of the Plan. The Court will consider each in turn.

1. Undue Delay / Laches

The equitable doctrine of laches derives from the maxim that those who sleep on their rights, lose them. *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 820 (7th Cir. 1999). Laches may estop a party from asserting a right or claim where, independent of the statute of limitations, a party's delay becomes inequitable. 31 Richard A. Lord, *Williston on Contracts* § 79:11 (4th ed.). Two basic elements comprise a laches defense: 1) an unreasonable lack of diligence by the party against whom the defense is asserted ; and 2) prejudice resulting from the delay. *Hot Wax*, 191 F.3d at 820.

Plaintiff urges that Defendants' conduct was "inexcusable" because they failed to bring a reformation claim after they were put on notice of the alleged error in the Plan in a footnote to a brief in the 1997 *Corcoran* litigation. However, Defendants' conduct does not rise to an inexcusable level. The

plaintiffs in the *Corcoran* litigation explicitly did not make a claim for benefits under the erroneous plan term, stating they believed it to be a scrivener's error. Furthermore, nothing changed in the conduct of the parties following the 1997 notification to Defendants–benefits continued to be paid and accepted under the Plan terms. Where a scrivener's error has not resulted in a dispute between the parties, it is not unreasonable for one to assume the terms of the agreement will continue to be carried out pursuant to the parties' mutual understanding. *See, e.g., Safeway, Inc. v. Sugarloaf P'ship, LLC.*, 423 F. Supp. 2d 531, 537 (D. Md. 2006) (no inexcusable delay where reformation action instituted only after tenant was notified that landlord desired to terminate lease).

Furthermore, Defendants' inaction did not prejudice Plaintiff. While witnesses' memories may have faded since the most relevant years in question (1996-1998) and documents have been lost or destroyed, Plaintiff has not shown any prejudice in presenting her case. Furthermore, Plaintiff has not been prejudiced because she was never aware of the scrivener's error, and she never relied on the possibility that the Transition Factor might be multiplied twice. In fact, even Plaintiff's counsel did not notice the double multiplication of the Transition Factor under § 16.5.1(a)(2) when this lawsuit was filed in 2005. Thus, the doctrine of laches will not bar reformation here.

2. Acquiescence & Ratification

Plaintiff argues that Defendants ratified and acquiesced to the alleged drafting error when the Plan was restated in 1997 with the error following receipt of

the *Corcoran* brief. Generally speaking, "[t]he power of a party to avoid a contract for mistake or misrepresentation is lost if after he knows or has reason to know of the mistake . . . he manifests to the other party his intention to affirm it." Restatement (Second) of Contracts § 380(2) (1981). A party acquiesces to a contract when it fails to repudiate benefits received, indicating acceptance of the contract terms. *Carr v. Runyan*, 89 F.3d 327, 332 (7th Cir. 1996).

The evidence here does not demonstrate that Defendants ratified the error or acquiesced to it. For nearly a decade Defendants calculated, reported, and paid benefits to Plan participants based on a single multiplication by the Transition Factor. Thus, they never manifested an intent to affirm the error. The 1997 Plan restatement was prepared pursuant to authorization given on June 26, 1997. The *Corcoran* brief was not received until August 8, 1997. And while Defendants had knowledge of the error by the time the Plan was restated in 1998 without the erroneous term, this does not indicate they acquiesced to it. In fact, it shows exactly the opposite of acquiescence. Furthermore, all of the communications sent to plan participants remained consistent throughout this time. The Court therefore sees no equitable basis under these principles that would bar reformation.

3. Inexcusable Negligence and Bad Faith

When a party seeks reformation of an instrument due to mistake, courts will not ordinarily deny relief even if that party was negligent. 27 Richard A. Lord, *Williston on Contracts* § 70:49 (4th ed.). "It is obvious that negligence itself is not a defense to reformation,

since there would then be no ground for reformation because of a mutual mistake, inasmuch as mistakes nearly always presuppose negligence." *Blumenfeld v. Neuman*, 112 N.E.2d 742, 745 (Ill. App. Ct. 1953); *see also, e.g., Pioneer Res. LLC v. D.R. Johnson Lumber Co.*, 68 P.3d 233, 251-52 (Or. Ct. App. 2003) (oversight in failing to read documents that might correct a party's mistaken understanding of a term is not gross negligence). In order to bar equitable relief, a party's negligence must be "gross," that is, it must "amount to a failure to act in good faith and in accordance with reasonable standards of fair dealing." Restatement (Second) of Contracts § 157 (1981). This language indicates a much higher standard than simple negligence – it rises to the level of wilful behavior where a party has knowingly acted in bad faith.

Defendants' behavior here did not rise to that standard. Plaintiff contends that Defendants were grossly negligent when they failed to detect the erroneous second Transition Factor in § 16.5.1(a)(2) before finalizing the 1996 Plan, setting forth numerous occasions where the Defendants could have discovered and corrected the mistake but failed to do so. Plaintiff also argues that Defendants were grossly negligent when they failed to correct the error in 1997.

There is no question Defendants were negligent in failing to discover and correct the scrivener's error prior to 1998. Defendants repeatedly failed to detect the erroneous second Transition Factor in § 16.5.1(a)(2) despite numerous revisions, the work of multiple ERISA experts, and the notice from the *Corcoran* litigants. Defendants had the resources and ability to notice and correct the erroneous second Transition Factor on multiple occasions. It befuddles

the Court how a major corporation could inattentively look over such a crucial plan term, and the Court cannot simply turn a blind eye to the profound degree of negligence Defendants exhibited here.

However, in a balance of the equities, the negligence is not so "inexcusable" or "gross" as to preclude reformation. No evidence indicates Defendants acted in bad faith or failed to follow reasonable standards of fair dealing. While Defendants' negligence was a "bell" ringer, it was not bad faith. The fact remains that Defendants and the Plan participants had a mutual understanding as to the Transition Factor provision of the Plan. Benefits were paid to the Class members based on that clear understanding. No one relied on the scrivener's error and no one anticipated they would receive benefits under a double multiplication of his or her Transition Factor. To preclude reformation here would produce a harsh and inequitable result and a huge windfall recovery for the Class. As a result, Defendants' negligence will not bar their reformation claim.

4. Unclean Hands

The "unclean hands" doctrine allows a court to deny equitable relief to a party who has engaged in unlawful or inequitable conduct in connection with the matter from which he or she seeks relief. *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1021 (7th Cir. 2002). In other words, it affords the court the power to refuse equitable relief if granting such relief would produce an illegal or unjust result. *Packers Trading Co. v. CFTC*, 972 F.2d 144, 48-49 (7th Cir. 1992). Wrongful conduct includes any acts which are inequitable,

unfair, dishonest, fraudulent, unconscionable, or in bad faith. 27A Am. Jur. 2d Equity § 100 (2d ed. 2009).

Plaintiff contends that Defendants had unclean hands as of August 1997, when it was put on notice of its error, and continuing to 1998, when it reissued the Plan without reference to the second Transition Factor. Plaintiff asserts that Defendants had a fiduciary duty to disclose the correction of the error as a "material modification" to the plan. *See* 29 U.S.C. § 1024(b)(1); 29 C.F.R. § 2520.104b-3. Furthermore, Plaintiff asserts Defendants knowingly submitted a copy of the Plan to the IRS in November 1997 with knowledge that they were not administering the Plan in accordance with its written terms.

Plaintiff has not shown that Defendants acted deceitfully, fraudulently, unconscionably or in bad faith. Defendants made a mistake drafting the Plan, a mistake which was undoubtedly negligent. However, Defendants continued to administer the Plan consistently throughout. Defendants' actions were in concert with both the Board authorization and the communications to the Plan participants regarding the implementation of the Cash Balance Plan. The Court does not find any evidence of wilful misconduct and therefore, Plaintiff's unclean hands defense will not bar reformation.

5. Judicial Estoppel

Finally, Plaintiff argues that the Court should estop Defendants from asserting a claim for reformation because they have "successfully" argued that reformation of unilateral mistake is unavailable. Judicial estoppel operates to prevent a party from

asserting a position inconsistent with an argument it prevailed on in a previous case. *Urbania v. Cent. States, Se. & Sw. Areas Pension Fund,* 421 F.3d 580, 589 (7th Cir. 2005). For judicial estoppel to apply: (1) the latter position must be clearly inconsistent with the earlier position; (2) the facts at issue must be the same in both cases; and (3) the party to be estopped must have prevailed upon the first court to adopt the position. *Id.* The threshold for prevailing on a judicial estoppel argument regarding inconsistency is high. *Kim v. Sara Lee Bakery Group, Inc.*, 412 F. Supp. 2d 929, 939 (N.D. Ill 2006).

Plaintiff relies on the arguments Defendants prevailed on in *Todisco v. Verizon Communications, Inc.* and *Gramm v. Bell Atlantic Management Pension Plan* to support its application of judicial estoppel in this case. *See Todisco*, 497 F.3d 95 (1st Cir. 2007), *aff'g.* No. 01-12116 (D. Mass 2001); *Gramm*, 983 F. Supp. 585 (D.N.J. 1997).

Contrary to Plaintiff's contention, the position adopted by Defendants in this case is not "clearly inconsistent" with the positions they adopted in *Todisco* or *Gramm*. In *Todisco*, a plan beneficiary allegedly relied on incorrect information she received orally via Verizon's telephone hotline. Verizon argued that she was not entitled to reformation of the plan because the oral information clearly conflicted with the terms of the plan. The *Todisco* court dismissed the plaintiff's claim, stating that "reformation is available to repair mistakes or confusion attending the formation of a contract" but holding that the plaintiff did not allege "that there were any mistakes or misunderstandings at the time of formation of the contract." *Todisco*, No. 01-12116 (D. Mass. 2001).

Verizon's argument in *Todisco* that oral communications cannot override plan terms is not inconsistent with their present argument of mutual mistake and scrivener's error.

Similarly, Plaintiff's reliance on *Gramm* as a basis for judicial estoppel is misplaced. In *Gramm,* the plaintiff, under an equitable estoppel theory, asked the court to bind Bell Atlantic to the allegedly misleading representations of pension benefits it sent him via informal written communications. 983 F. Supp. at 587. Defendants successfully argued that informal communications cannot trump plan terms where the plaintiff did not detrimentally rely on them . *Id.* In *Gramm,* there was no allegation of mutual mistake or scrivener's error. In fact, the court held that Bell Atlantic had communicated the proper plan terms to the plaintiff. Thus, the Court cannot accept Plaintiff's position that Defendants raised the same argument in *Gramm* as they have in the present case. Defendants are therefore not estopped from asserting their mutual mistake and scrivener's error argument.

CONCLUSION

This ERISA class action raises novel legal issues with billion dollar consequences. The Court has analyzed Plaintiff's claims under both a deferential and *de novo* standard of review. With respect to the Discount Rate Issue, the Court holds that under both standards of review, Defendants properly used an interest rate of 120% of the PBGC rate, rather than 100% of the PBGC rate, in calculating Plaintiff's opening balance. The Court concludes that this issue was properly within Defendants' discretion and

Defendants' interpretation was reasonable. *Young*, 575 F. Supp. 2d at 905-12.

With respect to the Transition Factor Issue, the Court concludes that Defendants abused their discretion by disregarding "unambiguous" Plan terms requiring the Transition Factor to be multiplied twice in calculating Plaintiff's opening balance. *Id.* at 918. After the trial *de novo*, the Court determines there was a scrivener's error in Plan § 16.5.1(a)(2) and Defendants are entitled to reformation to eliminate the second reference to the transition factor in Plan § 16.5.1(a)(2).

Accordingly, **Judgment is hereby entered in favor of Defendants and against Plaintiff on Counts I and II ("Discount Rate Issue") of Plaintiff's Second Amended Complaint.**

Judgment is hereby entered in favor of Plaintiff and against Defendants on Counts III and IV ("Transition Factor Issue") of Plaintiff's Second Amended Complaint to the extent that Defendants abused their discretion when, upon finding a mistake in the Plan, they decided to disregard the "mistaken" language and deny Plaintiff's claim.

Judgment is hereby entered in favor of Defendants and against Plaintiff on Defendants' Counterclaim for Reformation on theories of Scrivener's Error (Count I) and Mistake (Count II), and §§ 16.5.1(a)(2) of the 1996 and 1997 Cash Balance Plan are hereby reformed to eliminate the second reference to a Transition Factor

("multiplied by the applicable transition factor described in Table 1 of this Section").

Plaintiff Class members are not entitled to any additional Plan benefit distributions by reason of this litigation.

SO ORDERED THIS 2nd DAY OF NOVEMBER, 2009

/s/ MORTON DENLOW
MORTON DENLOW
UNITED STATES MAGISTRATE JUDGE

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 05 C 7314
Magistrate Judge Morton Denlow

[Filed August 28, 2008]

CYNTHIA N. YOUNG, on behalf of herself, and others similarly situated,	)
Plaintiff,	)
v.	)
VERIZON'S BELL ATLANTIC CASH BALANCE PLAN, formerly known as Bell Atlantic Cash Balance Plan, formerly known as Bell Atlantic Management Pension Plan, and VERIZON COMMUNICATIONS, INC., as successor in interest to Bell Atlantic Corporation,	)
Defendants.	)

MEMORANDUM OPINION AND ORDER

This is an ERISA class action suit in which Plaintiff Cynthia N. Young ("Plaintiff") alleges that Defendants

Verizon's Bell Atlantic Cash Balance Plan and Verizon Communications, Inc. (collectively "Defendants") calculated her pension benefits, and those of other similarly situated employees, using an improper formula. Plaintiff seeks judicial review of the final decision of Defendant Verizon's Bell Atlantic Cash Balance Plan Administrator denying her claim for additional benefits. The Court conducted a bench trial on the papers and heard oral argument on August 5, 2008. The Court has carefully considered the administrative record, declarations, and the briefs and arguments of counsel. The following constitute the Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

I. BACKGROUND FACTS

A. General Background

Plaintiff brings her claim on behalf of herself and a class of persons who were participants in the Bell Atlantic Management Pension Plan on December 31, 1995. Compl. ¶ 1.[1] The claim is brought under ERISA § 502(a)(1)(b), 29 U.S.C. § 1132(a)(1)(b), and § 502(a)(3), 29 U.S.C. § 1132(a)(3). Compl. ¶ 2.

Plaintiff was a management employee of Bell Atlantic. VZ 58, VZ 267.[2] For many years, Bell Atlantic operated a traditional pension plan, known as the Bell

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[1] Citations to Plaintiff's First Amended Complaint are identified as follows: Compl. ¶ __ (paragraph number).

[2] Citations to the Administrative Record are identified as follows: VZ ___ (page number).

Atlantic Management Pension Plan (the "BAMPP"), as part of the compensation package for its employees. VZ 85-180. For those employees choosing early retirement, Bell Atlantic would create "cash out windows" that would allow employees to receive their pension all at once, in the form of a lump-sum, rather than an annuity. VZ 130-135. When she retired in November 1997 with 29 years of credited service, Plaintiff elected to receive her retirement benefits in the form of a lump-sum payment. VZ 50. Plaintiff accrued benefits under a series of defined benefit pension plans, including the BAMPP.

Effective December 31, 1995, Bell Atlantic amended the BAMPP to add a cash balance formula and to adopt a new name, the Bell Atlantic Cash Balance Plan (the "Plan" or "1996 Plan"). VZ 1035-36; VZ 1046-1106. The actual Plan document ("1996 Cash Balance Plan" or the "Cash Balance Plan"), referred to as the "official plan document" was not finalized until July 6, 1996, but was made retroactive to December 31, 1995. VZ 1046- 1106. The Plan operated in accordance with this official plan document, the 1996 Cash Balance Plan, until it was amended in 1997 by the 1997 Cash Balance Plan. VZ 182-244. Thereafter, the Plan was amended on a yearly basis, and after Bell Atlantic merged with Verizon, it was renamed as the Verizon's Bell Atlantic Cash Balance Plan. VZ 11712-17; VZ 12586. The 1996 Cash Balance Plan was in effect at the time of Plaintiff's retirement, and is thus the version of the Plan at issue in this case.

B. Cash Balance Plan Operation

The Cash Balance Plan provides pension benefits expressed as a specific dollar amount to be paid upon

retirement in any number of forms, including a lump-sum or an annuity. VZ 1055. For participants who worked at Bell Atlantic prior to the conversion to the Cash Balance Plan and who accrued benefits under the BAMPP, the Cash Balance Plan devoted a separate section of the plan to the calculation of the opening balances of their Cash Balance Accounts, § 16.5 "Opening Balance." VZ 1100. That section provided several different formulas for calculating opening balances, depending on the particular circumstances of the participant. VZ 1100-01.

The two formulas at issue in this case are found in § 16.5.1(a)(1), which applies to former participants of the BAMPP who were eligible for service pensions on December 31 1995, and § 16.5.1(a)(2), which applies to former participants of the BAMPP who were not eligible for service pensions on December 31, 1995. VZ 1100.

1. The PBGC Interest Rate under §§ 16.5.1(a)(1) and (a)(2)

Both §§ 16.5.1(a)(1) and 16.5.1(a)(2) require the pension benefits due to participants under the BAMPP as of December 31, 1995, to be converted into a lump-sum. VZ 1100. Generally, to determine the lump-sum, the plan uses a mortality table to determine the participant's life expectancy at the time of the conversion, and applies an interest rate to convert the sum of the expected values of participant's age - 65 (normal retirement age) annuity payments into a lump-sum cashout benefit. *Id.*

Section 16.5 of the Cash Balance Plan sets forth the formulas for converting the benefits to a lump-sum. Section 16.5 states as follows:

> **16.5 Opening Balance**
> The provisions of Section 4.3 of the Plan shall be supplemented by the following:
>
> > **16.5.1 Pension Conversions as of the Transition Date**
> > Where a present value must be determined under this Section 16.[5], the present value shall be determined as follows: (a) using the PBGC interest rates which were in effect for September of 1995 (using the immediate PBGC rate for a Participant who was then eligible for a Service Pension under the 1995 BAMPP Plan, and using the deferred PBGC rates for individuals who were not then eligible for a Service Pension), (b) using the UP-84 mortality table, and (c) taking account of age in years and completed months, *either* as of December 31, 1995 (for Participants not eligible on the Transition Date for a Service Pension under the 1995 BAMPP Plan) or as of November 15, 1996 (for Participants who were eligible on the Transition Date for a Service Pension).
> >
> > > **16.5.1(a) 1995 Active Participants and 1995 Former Active Participants**
> > > In the case of a 1995 Active Participant or 1995 Former Active Participant, the opening balance of the Participant's Cash Balance Account on January 1, 1996 shall be the amount described in subsection (1) or (2) below, as applicable:

16.5.1 (a)(1) If Eligible for Service Pension

If, as of December 31, 1995, the Participant was eligible for a Normal Retirement Service Pension or an Early Retirement Service Pension under the 1995 BAMPP Plan, then the amount described in this paragraph (1) is the product of multiplying (A) the Participant's applicable Transition Factor described in Table 2 of this Section, *times* (B) the lump-sum cashout value of the immediate annuity benefit under the 1995 BAMPP Plan, determined as if the Participant had retired on December 31, 1995, ignoring any compensation paid after the date of the last paycheck for salary earned in December 1995. For a 1995 Former Active Participant, the date on which the individual ceased to be an Eligible Employee shall be substituted for December 31, 1995 in the last phrase of the previous sentence.

16.5.1(a)(2) Not Eligible for Service Pension

In the case of a Participant who is not eligible for a Service Pension under the 1995 BAMPP Plan as of the Transition Date, the amount described in this paragraph (2) is the product of multiplying (A) the Participant's applicable Transition Factor described in Table 1 of this Section, *times* (B) the lump-sum cashout value of the Accrued Benefit payable at age 65 under the 1995

> BAMPP Plan, determined as if the Participant had a Severance From Service Date on December 31, 1995, based on Compensation paid through December 31, 1995, multiplied by the applicable transition factor described in Table 1 of this Section. For a 1995 Former Active Participant, the date on which the individual ceased to be an Eligible Employee shall be substituted for December 31, 1995 in the last phrase of the previous sentence.

VZ 1100.

Plaintiff alleges that Defendants used the wrong PBGC interest rate when calculating the opening balance of her account. Defendants used a rate of 120% of the applicable interest rate[3] specified by the Pension Benefit Guaranty Corporation ("PBGC") if the amount of the lump-sum, based on the 120% rate, exceeded $25,000; and the applicable PBGC rate if the lump-sum amount did not exceed $25,000, as provided for in § 4.19 of the BAMPP. VZ 11; VZ 133-34; VZ 1100.

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[3] The term "applicable interest rate" is defined in § 4.19 (c)(2)(C) as follows:

> the applicable PBGC interest rate in effect on the last day of the calendar month immediately preceding the first month of the calendar quarter in which the Severance from Service Date occurs. The applicable PBGC interest rate for cash-out of a Normal or Early Retirement Service Pension shall be the PBGC immediate rate for lump sums and for cash-out of a Deferred Vested Pension shall be the deferred and immediate PBGC rates for lump sums, as applicable.

VZ 135.

Because Plaintiff's lump-sum amount exceeded $25,000, Defendants used 120% of the PBGC applicable interest rate. VZ 11-12. The use of this interest rate reduced her opening cash balance to $240,127 compared to $292,383 if 100% of the applicable PBGC applicable interest rate had been used. VZ 10. Plaintiff argues that Defendants should have applied § 16.5.1 of the Cash Balance Plan, and accordingly, should have used 100% of the applicable PBGC rate, rather than applying § 4.19 of the BAMPP.

2. The Transition Factor in § 16.5.1(a)(2)

Plaintiff also contends that Defendants incorrectly calculated her opening balance formula under § 16.5.1(a)(2) by multiplying her applicable transition factor by her lump-sum cashout value only once. To compute her opening balance, Defendants multiplied her lump-sum cashout value by her applicable transition factor. Plaintiff, however, argues that § 16.5.1(a)(2) requires Defendants to multiply her transition factor twice. Multiplying the transition factor twice for Plaintiff's opening account balance would increase that balance from $240,813 to $640,321. VZ 15648.

II. PROCEDURAL HISTORY

On June 9, 2004, Plaintiff filed her initial administrative claim for benefits on the grounds that Defendants incorrectly determined her opening account balance because it used 120% of the PBGC rate, instead of 100%, in performing the calculation. VZ 2-3. The Verizon Claims Review Unit ("Review Unit") denied this claim on October 19, 2004. VZ 10-15. Plaintiff appealed the Claim Review Unit's decision on

December 6, 2004, and the Verizon Claims Review Committee ("Committee") denied Plaintiff's appeal on February 16, 2005. VZ 50-57.

A. Administrative Decision Regarding the PBGC Interest Rate

In its denial letter, the Review Unit explained that it used 120% of the PBGC rate, rather than 100% of the PBGC rate, because that is what is required under § 16.5.1(a)(2). Because § 16.5.1(a)(2) states that the opening cash balance account is determined by multiplying the "Transition Factor described in Table 1" by "the lump-sum cashout value of the Accrued Benefit payable at age 65 *under the 1995 BAMPP Plan* . . .", Defendants applied § 4.19(c)(2)(C) of the BAMPP to determine the lump-sum cashout value, in which "the lump-sum cashout value is determined, for present values exceeding $25,000, using 120% of the PBGC deferred interest rates in effect for September of 1995 . . ." VZ 11 (emphasis added).

In her appeal letter, Plaintiff challenged Defendants' use of § 4.19(c)(2)(C) of the BAMPP because, according to Plaintiff, it "applies only to the 1994-95 cash-out window and is not applicable to all distributions from the BAMPP." VZ 46. Plaintiff contends that because § 16.5.1 provides a formula for determining the present value, and because § 16.5.1(a)(2)(B) uses the term "lump-sum cashout value" without specifically re-defining that term, the lump-sum cashout value is synonymous with the term "present value," and thus § 16.5.1 governs how to determine that value. Plaintiff states that "Section 16.5.1 specifically references the PBGC rates and

makes no mention of the use of 120% of the PBGC rates." *Id.*

In reviewing Plaintiff's appeal of the Review Unit's decision, the Committee examined the relevant provisions of the current Verizon Plan, § 16 of Verizon's Bell Atlantic Cash Balance Plan as set forth in a document restated effective January 1, 1999 (the "1999 Bell Atlantic Plan"). The Committee also reviewed the provisions of § 16 of the 1996 Cash Balance Plan, which was in effect when Plaintiff retired. In addition, the Committee reviewed the resolutions authorized by the Human Resources Committee of Bell Atlantic's Board of Directors ("HRC") to amend the BAMPP. The Committee also consulted with David Beik of Verizon's finance department, and Rita Galgano of Verizon's pension department. VZ 55-56.

After reviewing the above documents and consulting with those individuals, the Committee concurred with the Review Unit's decision that "the opening balance of [Plaintiff's] cash balance account was appropriately determined using 120% of the PBGC deferred rates for September of 1995." VZ 56. The Committee found that Plaintiff's "potential lump-sum benefit under Section 4.19 is the 'lump-sum cashout value' referred to in Section 16.5.1(a)(2) of the [1996 Cash Balance Plan], which pursuant to Section 4.19(c)(2)(C), is calculated using 120% of the PBGC deferred interest rates for September of 1995." VZ 55. The Committee found the statement in § 16.5.1 of the 1995 Bell Atlantic Plan regarding "present value" determinations does not override the specific reference to "lump-sum cashout value" in § 16.5.1(a)(2). VZ 57. The Committee further stated that the use of 120% of

the PBGC deferred rates is consistent with the resolutions of the Human Resources Committee amending the BAMPP to provide for the cash balance conversion, assumptions applied for plan funding purposes, administrative interpretation of plan terms, and restated plan language intended to preserve rules relating to the cash balance conversion. *Id.*

To support its finding, the Committee references the October 23, 1995 resolutions of the HRC authorizing the amendments to the BAMPP, "in the manner presented to th[e] meeting." VZ 55-56. The Committee cited the proposed BAMPP amendments presented to the HRC, explaining how "a participant's opening account balance shall be equal to the product of the cashout value of the participant's accrued benefit on the Effective Date, [i.e., December 31, 1995] (determined under the existing rules of BAMPP as of 12/31/95) . . ." VZ 56. The Committee also cited the statements of Mr. Beik in Verizon's finance department, explaining that for plan funding purposes, both before and after the conversion, "the opening cash balance account values [were] determined using 120% of the applicable PBGC rate for benefits valued in excess of $25,000." *Id.*

The Committee additionally cited Rita Galgano from Verizon's pension department, who advised the Committee that "Section 16.5.1(a)(2) of the [1996 Cash Balance Plan] reflects the amendments to the BAMPP made by the [HRC] in October of 1995 and supports the conclusion of the plan administrator that 120% of the September 1995 PBGC deferred interest rates should be used to determine opening cash balance accounts for participants with deferred vested pensions valued in excess of $25,000." *Id.*

Finally, the Committee looked to § 16.4.1(b)(2) of the 1999 Bell Atlantic Plan, where the cash balance transition provisions were restated. Those provisions now describe the calculation of the opening balance for a participant who is ineligible for a Service Pension as being the product of the transition factor times "the present value of the Participant's benefit." § 16.4.1(a)(1) of the 1999 Bell Atlantic Plan states that the "present value" is determined by using 120% of the applicable PBGC rate if the present value is $25,000 or more. VZ 56.

B. Plaintiff's Lawsuit Filed

Plaintiff filed the complaint in this action on December 30, 2005, asserting only her PBGC rate claim. In July 2006, Plaintiff sought leave to amend the complaint to add a second claim, asserting that § 16.5.1(a)(2) should be read to require multiplying the lump-sum cashout value twice by the applicable transition factor. Compl. ¶¶ 52-59; Dkt. 36, 44. The Court granted the motion and stayed all proceedings to permit Plaintiff to seek administrative review of her second claim. Dkt. 43. The Review Unit denied this claim on December 8, 2006, and after Plaintiff appealed the denial, the Committee rejected her appeal on April 5, 2007. VZ 13666, VZ 15645.

C. Administrative Decision Regarding the Transition Factor

In reviewing Plaintiff's claim that the language of § 16.5.1(a)(2) required the transition factor to be multiplied twice, the Review Unit considered the relevant plan provisions, and other plan documents and records, including earlier and later restatements

of the plan, and plan summary documents sent to employees. The Review Unit also considered the resolutions adopting the pension plan amendments, and consulted with Bell Atlantic staff members familiar with the Plan. In its letter, the Review Unit set forth a timeline indicating the various points at which the Plan was amended, demonstrating the dates at which the reference to the second transition factor appeared. The Review Unit concluded that the second reference to the transition factor in § 16.5.1(a)(2) was a "mistake." VZ 13670. It set forth various reasons for this conclusion, including the following:

> If the intention had been to apply the transition factor twice, it would have been more natural to increase the transition factors in the Schedule. There are two other plan provisions that refer to the transition factors. . .and both of these provisions refer to multiplication by the transition factor only once.
>
> . . . .
>
> All notices and statements explaining the conversion and providing benefit amounts to employees (provided on dates both before and after the mistake was made) refer to application of the transition factor only once, for all affected participants.
>
> The 1997 Actuarial Report for the Bell Atlantic Plan refers to application of the transition factor only once, for all affected participants. The 1998 and 1999 restatements of the Bell Atlantic Plan provide for application of the transition factor only once, for all affected participants.

VZ 13682-83.

In addition, both Robert Moreen, the leader of the Mercer Team that worked on the cash balance conversion, and Barry Peters, the Bell Atlantic benefits attorney at the time of the conversion, "advised that it was never intended that the transition factor would be applied twice and that the plan provision in question was incorrect." VZ 13683. The Review Unit also based its decision on its finding that the HRC, in approving an amendment to convert the existing Bell Atlantic Pension Plan to a cash balance plan, only authorized the transition factor to be applied once, for all affected participants. *Id.* Because the double application of the transition factor would significantly increase the cost of the plan, the HRC would be required to specifically approve that change, which it did not do. Based on these findings, the Review Unit denied Plaintiff's claim. VZ 13684.

On appeal, Plaintiff argued the plan language is clear and cannot be validly interpreted to remove the second reference to the transition factor. VZ 15646. In reviewing Plaintiff's appeal of the Review Unit's decision, the Committee looked to other plan documents and other plan provisions that provide for only a single application of the factor. VZ 15645-50. The Committee found it necessary to interpret the Plan to resolve the inconsistency among the documents and that it is appropriate to review other contemporaneous plan records to that end. Because "all of the plan documents, communications, and other materials, other than the 1996 and 1997 plan restatements, reflect a single application of the transition factor," the Committee agreed with the Unit's conclusion that the reference to the second transition factor was a mistake and cannot be applied to increase Plaintiff's benefits. VZ 15647-48. Of

particular note to the Committee was the material sent to employees showing them how their opening balance would be determined. This material referred several times to the "transition multiplier" as being multiplied only once. *Id.* Nowhere in other materials sent to employees did it state that the transition factor would be multiplied twice.

In further support of their conclusion, the Committee noted there would be no reason for singling out the employees described in § 16.5.1(a)(2) for application of the transition factor twice, which would result in a substantially higher balance increase for such employees. *See* VZ 15648 (finding that applying the transition factor twice for Plaintiff's opening account balance would increase that balance from $240,812.83 to $640,321.34). The Committee also points out its belief that the cause of the error was a restructuring of the plan provisions to refer to the transition factor at the beginning of the paragraph instead of at the end, and that the draftsperson neglected to remove the reference to the transition factor after adding a reference at the beginning of that section. *Id.*

The Committee agreed with the Review Unit's conclusion that the double application of the transition factor was not authorized. The Committee considered Plaintiff's argument that "it is inconceivable that the Board and the [HRC] failed to review these Plans at the time they were promulgated. . . at the very least, the Board and/or the Committee permitted these Plans to be operative documents [and] Verizon is estopped from contending otherwise." VZ 15649. However, the Committee stated that the Board and the HRC entered resolutions only approving amendments that provided

for the application of the transition factor once, and did not approve any such amendments for a second application of the transition factor. *Id.* Accordingly, the Committee upheld the Review Unit's decision and denied Plaintiff's appeal. *Id.*

D. Phase One - Trial on the Papers Applying the Deferential Standard of Review

On January 16, 2007, the Court certified the case to proceed as a class action, based upon the parties' stipulation (with two sub-classes, one for each claim at issue). Dkt. 58-61. After Plaintiff's transition factor claim was denied by the Committee, Plaintiff was allowed to take discovery on "the drafting history and facts directly related to the transition factor provision." Dkt. 86. Thereafter, the parties proceed with this trial on the papers regarding the administrative denial of Plaintiff's claims, with the initial briefs limited to documents in the administrative record, applying the standards of administrative review. Dkt. 109. Following this process, the Court will also permit the parties to proceed at a later hearing with *de novo* review by the Court. The Court is proceeding in this manner to enable a reviewing court to decide the appropriate standard of review, to have a complete record, and to reach a final decision without the necessity for a later remand. No final judgment will be entered by this Court until the second phase hearing is completed.

III. TRIAL ON THE PAPERS

This case comes before the Court by means of a trial on the papers in which the parties submitted briefs and the administrative record, which constitute

the record in this case. *See Sullivan v. Bornemann*, 384 F.3d 372, 375 (7th Cir. 2004) (noting that a district court decision, rendered after reviewing the stipulated facts of the parties, was more akin to a bench trial than summary judgment, and was thus governed by Federal Rule of Civil Procedure 52(a)); *Hess v. Hartford Life & Accident Ins. Co.*, 274 F.3d 456, 461 (7th Cir. 2001) (entering a judgment based upon a stipulation of facts that made up an administrative record was treated as a bench trial governed by Fed. R. Civ. P. 52(a)); *SparkNet Comme'ns, L.P. v. Bonneville Int'l Corp.*, 386 F. Supp. 2d 965 (N.D. Ill. 2005) (conducting a trial on the papers in a trademark infringement case); *Crespo v. Unum Life Ins. Co. of America*, 294 F. Supp. 2d 980, 991-92 (N.D. Ill. 2003) (recommending that parties involved in cases reviewing ERISA benefit claims should consider a trial on the papers rather than filing cross-motions for summary judgment); Morton Denlow, *Trial on the Papers: An Alternative to Cross-Motions for Summary Judgment*, Fed. Law., Aug. 1999, at 30 (analyzing the advantages and disadvantages of utilizing a trial on the papers as an alternative to cross-motions for summary judgment). The parties have agreed to proceed in this manner and to waive their right to present oral testimony.

IV. STANDARD OF REVIEW

A. Deferential Standard of Review

When reviewing a denial of benefits under an ERISA plan, the Court must look to the plan language to determine the appropriate standard to be applied. *See Metro. Life Ins. Co. v. Glenn*, --- U.S. ---,---, 128 S. Ct. 2343, 2348 (2008); *Vallone v. CNA Fin. Corp.*, 375

F.3d 623, 631 (7th Cir. 2004). Principles of trust law require courts to review plan administrator's decisions to deny plan benefits under a *de novo* standard unless the plan provides to the contrary. *Glenn*, 128 S. Ct. at 2348; *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). If the plan language grants the administrator discretion to interpret the plan terms or determine benefits eligibility, then the Court will review a denial of benefits under a deferential standard of review. *See Glenn*, 128 S. Ct. at 2348; *Vallone*, 375 F.3d at 631.

The 1996 Cash Balance Plan grants broad discretion to the Review Unit and the Committee to "make findings of fact; to interpret the Plan and resolve ambiguities therein; to make factual determinations; to determine whether a claimant is eligible for benefits; to decide the amount, form, and timing of benefits; and to resolve any other matter under the Plan which is raised by the claimant or identified by the respective committee." 1996 Cash Balance Plan, VZ 1088. Because this language broadly grants discretionary authority to the Review Unit and the Committee, the Court will begin its review under the deferential abuse-of-discretion standard.[4] *See*

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[4] Although also often referred to as the "arbitrary and capricious" standard, courts appear to be moving away from using this phrase to describe this standard of review, and are rather referring to it as the deferential abuse-of-discretion standard of review. *See Glenn*, 128 S. Ct. 2343(describing the standard as a deferential standard of review, and one that requires the court to determine whether the plan administrator abused its discretion in denying benefits); *See Rush Prudential HMO v. Moran*, 536 U.S. 355, 384 n. 15, 386 (2002) (referring to the standard as requiring deferential review and reviewing for abuse of discretion); *See*

Glenn, 128 S. Ct. at 2348; *Williams v. Interpublic Severance Pay Plan*, 523 F.3d 819, 821 (7th Cir. 2008) (finding the Plan language authorizing the administrator to "interpret the Plan, make findings of fact, and . . . decide any and all matters arising hereunder, including the right to remedy possible ambiguities, inconsistencies or omissions" as granting discretionary authority to the administrator requiring deferential judicial review).

The Court's role under the deferential standard of review is not to decide whether it would reach the same conclusion as the plan administrator, nor may the Court substitute its judgment for that of the plan administrator. *Carr v. Gates Health Care Plan*, 195 F.3d 292, 294 (7th Cir. 1999); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 936 (7th Cir. 1989). Rather, under this standard, a plan administrator's decision will be upheld so long as it is possible to offer a reasoned explanation, based on evidence, for that decision. *See Glenn*, 128 S. Ct. at 2349 (explaining this abuse of discretion standard in ERISA cases); *Speciale v. Blue Cross and Blue Shield Ass'n.*, --- F.3d ---, 2008 WL 3155058 (7th Cir. 2008). A court may also uphold an administrator's decision so long as "'the decision is based on a reasonable explanation of relevant plan documents, or . . . the administrator has based its decision on a consideration of the relevant factors that encompass the important aspects of the problem.'" *Speciale*, 2008 WL 3155058 (quoting *Sisto v. Ameritech*

Gutta v. Standard Select Trust Ins. Plans, 2008 WL 3271414 (7th Cir. 2008) (describing the standard as "the deferential abuse-of-discretion (or arbitrary and capricious) standard") (unpublished opinion).

Sickness & Accident Disability Benefit Plan, 429 F.3d 698, 700 (7th Cir. 2005).

B. Conflict of Interest

When determining whether an abuse of discretion exists, the Court may weigh certain factors in its analysis. For example, where "a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion." *Firestone*, 489 U.S. at 115. The Supreme Court recently discussed how courts should treat potential conflicts of interest in ERISA cases. In *Metropolitan Life Insurance Company v. Glenn*, the Court held that an administrator who is also the plan sponsor suffers from an inherent conflict of interest. *Glenn*, 128 S. Ct. at 2348. The Court confirmed that this conflict is one of several different factors to be considered by a court when reviewing the propriety of a benefit denial, and that "the significance of the factor will depend upon the circumstances of the particular case." *Id.* at 2346, 2351. In addition to the impartiality of the administrator, the Court may also consider "the complexity of the issues, the process afforded the parties, the extent to which the decision makers utilized the assistance of experts where necessary, and . . . the soundness of the fiduciary's ratiocination." *Carr*, 195 F.3d at 195. When considering different factors, "any one factor will act as a tiebreaker when the other factors are closely balanced, the degree of closeness necessary depending upon the tiebreaking factor's inherent or case-specific importance." *Glenn*, 128 S. Ct. at 2351. Thus, a conflict of interest may prove more or less important depending upon the particular circumstances of each

case. *See id.* (stating a conflict of interest "should prove more important where circumstances suggest a higher likelihood that it affected the benefits decision . . . [and] should prove less important where the administrator has taken active steps to reduce potential bias and to promote accuracy. . .").

Because Verizon is both the plan sponsor and the plan's administrator, it possesses an inherent conflict of interest which must be considered as a factor in the Court's determination of whether the administrator abused its discretion in upholding the denial of Plaintiff's benefits. *Glenn,* 128 S. Ct. at 2348. The fact that Plaintiff represents a class with claims totaling billions of dollars in damages causes the Court to place greater importance on this conflict of interest in its analysis than it might otherwise do in the typical individual action.

C. Interpreting ERISA Plan Language

Ambiguities in ERISA benefit plans fall into two categories: intrinsic and extrinsic ambiguities. The terms of a benefit plan can themselves create an intrinsic ambiguity, where "the agreement itself is unclear." *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 544-45 (7th Cir. 2000). An intrinsic ambiguity appears clearly on the face of the document "without having to know anything about how it interacts with the world." *Id.* at 543. An "[i]ntrinsic ambiguity exists when the contract's terms are internally unclear and the agreement is thus susceptible to more than one reasonable interpretation." *Chicago Area I.B. of T. Health & Welfare Trust Fund v. Kennicott Bros. Co.*, 1998 WL 122777 (N.D. Ill. 1998). An intrinsic ambiguity exists when language in an ERISA plan, if

read literally, would "make you scratch your head." *Rossetto*, 217 F.3d at 544.

If the language in an ERISA plan is unambiguous, the Court should not consider extrinsic evidence. *Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662, 665 (7th Cir. 2003); *Grun v. Pneumo Abex Corp.*, 163 F.3d 411, 420 (7th Cir. 1999) (finding the plan language allowing the plaintiff "to severance compensation upon the occurrence of 'a relocation of the Company's principal executive offices or [the plaintiff's] relocation to any place other than the location at which he performed his duties prior to a change in control of the Company'" to be unambiguous).

A court may consider extrinsic evidence, however, when determining whether an extrinsic ambiguity exists. *See Rossetto*, 217 F.3d at 547. An extrinsic ambiguity is "an ambiguity (that is, something that makes it possible to interpret a document reasonably in more than one way) that is recognized as such only when a contract clear on its face - clear, that is to the uninformed reader - is applied to a particular dispute." *Id.* at 542-43. The Seventh Circuit has warned that in contract law, the doctrine of extrinsic ambiguity should be interpreted narrowly, stating:

> The doctrine of extrinsic ambiguity is an exception to the rule that contracts clear on their face will be enforced as written. It should be interpreted narrowly lest it swallow the rule and make written contracts mere scraps of paper. Unless the evidence sought to be introduced not only is objective but would if believed make a compelling case that the

> contract means other than what it seems to mean, it should be kept out.

PMC, Inc. v. Sherwin Williams Co., 151 F.3d 610, 615 (7th Cir. 1998).

If the terms of the plan are clear, the plan's terms are ordinarily controlling and the court normally will not look beyond the terms of the plan. *Mathews v. Sears Pension Plan*, 144 F.3d 461, 466 (7th Cir. 1998). This "four corners" rule protects contracting parties from the uncertainty that would result if a judge or jury were free to consider evidence that would contradict the written contract terms. *Id.* In limited circumstances, parties are allowed to present extrinsic evidence to demonstrate that although the language appears clear, the context of its creation requires a different interpretation. *Id.* at 466-67. Objective evidence can create an extrinsic ambiguity in otherwise clear plan terms. *See id.*

Still, courts have found that contract language contains an extrinsic ambiguity when "a literal interpretation" would "lead to an unreasonable or absurd result." *Chicago Bd. Options Exch., Inc. v. Conn. General Life Ins. Co.*, 713 F.2d 254, 258 (7th Cir. 1983). If persons knowledgeable about the circumstances surrounding the contract would find a literal reading of the plan to be "nonsense," this could be evidence of an extrinsic ambiguity. *Fed. Deposit Ins. Corp. v. W.R. Grace & Co.*, 877 F.2d 614, 621 (7th Cir. 1989). Once an intrinsic or extrinsic ambiguity in the terms of a plan is identified, relevant objective extrinsic evidence is admissible to resolve the ambiguity. *See Rossetto*, 217 F.3d at 547.

Where courts consider extrinsic evidence to find an ambiguity, the evidence must be "objective." *Bock v. Computer Assocs. Int'l Inc.* 257 F.3d 700, 707 (7th Cir. 2001). To be considered objective, the subject matter of the evidence must relate to objective facts in the world, rather than subjective statements made by an interested party. *Mathews,* 144 F.3d at 467; *Bock,* 257 F.3d at 708 n.1.[5]

Under the deferential review standard, "the plan administrator may conclusively interpret ambiguous plan terms." *Hightshue v. AIG Life Ins. Co.,* 135 F.3d 1144, 1149 (7th Cir. 1998). The Court must view "contractual ambiguity through a lens that gives broad discretion to the plan administrator to interpret the plan." *Hess v. Reg-Ellen Mach. Tool Corp.,* 423 F.3d 653, 662 (7th Cir. 2005). Deference to the Committee's discretionary interpretation is "especially applicable" when plan language is ambiguous, "for that is precisely when the administrator exercises his grant of discretion." *Id.*

V. DISCUSSION

This case presents two issues for review. Plaintiff first argues that Defendants applied the wrong interest rate when calculating her opening account balance by using an interest rate equal to 120% of the PBGC rate rather than 100% of the PBGC rate as

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[5] Plaintiff also puts forth a requirement she says is implied in the case law - that the evidence was available to all contracting parties at the time of the contract formation. The Court, however, does not agree that the case law supports such a requirement. *See Central States Southeast & Southwest Areas Pension Fund v. Central Cartage Co.,* 69 F.3d 1312, 1317 (7th Cir. 1995).

required under § 16.5.1 of the Cash Balance Plan ("Discount Rate Issue"). As a result, Plaintiff asserts that her opening balance was understated by more than $50,000 and the opening balance of the class was understated by approximately $336,000,000. Comp. ¶¶ 30-51. Defendants assert the Committee reasonably interpreted the Plan and used 120% of the PBGC rate as required under § 4.19 of the BAMPP when calculating the opening account balance.

Plaintiff next argues that the Committee abused its discretion when it deleted the second reference to the transition factor in the calculation of Plaintiff's opening balance ("Transition Factor Issue"). Plaintiff argues the Committee overstepped its authority by effectively re-writing the Plan terms. Plaintiff asserts the language is unambiguous, and therefore cannot be interpreted by the Committee to mean anything different than what it says. Plaintiff contends that only a court of equity has the authority to reform a contract. Defendants assert the second reference to the transition factor is ambiguous, and that upon examining extrinsic evidence and finding that the insertion of the second reference was a drafting error, the Committee appropriately interpreted the language as if the disputed language was no longer in the Plan. The Court addresses each of these issues below.

A. Because of the Large Monetary Amount at Stake, the Court Considers the Committee's Conflict of Interest a Significant Factor in its Analysis.

A court may give less deference to an administrator's decision where it has a greater suspicion that the administrator lacked impartiality

due to a conflict of interest. *Glenn,* 128 S. Ct. at 2351. The Committee suffers from an inherent conflict of interest given its status as plan administrator and plan sponsor. Furthermore, given the large monetary amount at stake, the Court considers the Committee's conflict as a significant factor in its analysis. Plaintiff's claim involves hundreds of millions of dollars on the Discount Rate issue and billions of dollars on the Transition Factor issue. Although the Committee was limited to a review of Plaintiff's individual claims, it was aware of the pendency of this class action litigation and the impact that its decision would have on other claims of similarly situated employees. Any employee sitting on the Review Unit or the Committee who is concerned about job security is likely to think twice before making a decision that could cost his or her company billions of dollars. *See Id.* Accordingly, the Court will give the Committee considerably less deference in reviewing its decision, given the fact that approximately $2.5 billion is involved and the decision to deny Plaintiff's claim was made by Verizon employees.

B. Discount Rate Issue

Plaintiff argues that § 16.5.1 dictates the formula to be used to calculate her opening account balance. Plaintiff contends that because § 16.5.1 provides a formula for determining the present value, and because § 16.5.1(a)(2) refers to the term lump-sum cashout value without re-defining that term, the lump-sum cashout value is synonymous with the term "present value." Accordingly, Plaintiff asserts that § 16.5.1 governs how to determine that lump-sum cashout value, which uses 100% of the PBGC rate when determining the opening account balance.

Defendants, however, interpret lump-sum cashout value as not being synonymous with the term "present value" as stated in § 16.5.1. Rather, Defendants assert the lump-sum cashout value is to be determined by a formula under the 1995 BAMPP Plan, and thus uses the formula under § 4.19 of 1995 BAMPP Plan, calling for the use of 120% of the PBGC rate. The Committee denied Plaintiff's claim, agreeing with Defendants' use of 120% of the PBGC rate. The Court finds this determination reasonable, and therefore upholds the Committee's decision regarding the Discount Rate.

The Committee's determination is based on a reasonable interpretation of the relevant plan documents. The plan provisions in § 16.5.1 and § 16.5.1(a)(2) use two different terms, "present value" and "lump-sum cashout value." VZ 1100. Rather than using the term "present value," the text of §§ 16.5.1(a)(1) and (a)(2) uses the more specific term, "lump-sum cashout value" of a participant's accrued benefit "under the 1995 BAMPP Plan." VZ 1100. Thus, it is not unreasonable to interpret these terms to mean two different things. *See Taracorp, Inc. v. NL Indus., Inc.*, 73 F.3d 738, 744 (7th Cir. 1996) ("[W]hen parties to the same contract use such different language to address parallel issues . . . it is reasonable to infer that they intend this language to mean different things."). In contrast to § 16.5.1(a)(1) and § 16.5.1(a)(2), § 16.5.2(a)(1) and § 16.5.2(a)(2) use the term "present value" in calculating the opening balance formulas for participants covered by those sections, stating that those participants' opening balances shall be calculated using the "present value," not the "lump-sum cashout value," of their accrued benefits. *See* VZ 1101. Therefore, the "present value" calculation found in § 16.5.1 would be applicable there.

Most compelling to the Court is the fact that § 16.5.1(a)(2) specifically indicates that the lump-sum cashout value is to be determined under the 1995 BAMPP methodology. As the Committee noted in its decision letter, § 16.5.1(a)(2), which is the provision governing Plaintiff's benefits, states that "[i]n the case of a Participant who is not eligible for a Service Pension under the 1995 BAMPP Plan as of the Transition Date, the amount described in this paragraph (2) is the product of multiplying (A) the Participant's applicable Transition Fact described in Table 1 of this Section, *times* (B) the lump-sum cashout value of the Accrued Benefit payable at age 65 *under the 1995 BAMPP Plan, determined as if the Participant had a Severance From Service Date on December 31, 1995, based on Compensation paid through December 31, 1995.*" VZ 1100 (emphasis added). The Committee determined that the plain meaning of the phrase "lump-sum cashout value of the Accrued Benefit payable at age 65 under the 1995 BAMPP Plan" incorporated the "lump-sum cashout" methodology of the BAMPP for the purpose of converting Plaintiff's accrued benefit to a lump-sum. VZ 56-57. The Committee explained: "Section 16.5.1(a)(2) [of the Cash Balance Plan], which describes specifically how to calculate the opening balance for participants ineligible for a Service Pension, provides for use of the 'lump-sum cashout value' determined under the 1995 BAMPP Plan as if the participant had separated immediately before the cash balance conversion at the end of 1995." VZ 55.

The Committee interpreted that language to mean that the lump-sum cashout value is to be determined under the formula stated in the 1995 BAMPP Plan. Because the language in § 16.5.1(a)(2) uses such

language, the Committee's interpretation to look to the 1995 BAMPP Plan to determine the lump-sum cashout value was reasonable. Because § 4.19(c)(2)(C) of the 1995 BAMPP Plan provided for determination of the lump-sum cashout value, it was proper for the Committee to apply that provision to § 16.5.1(a)(2). Furthermore, the 1995 BAMPP Plan was attached as Appendix A to the 1996 Plan which further supports the Committee's determination to apply the 1995 BAMPP methodology. VZ 1106.

Section 4.19 (c)(2)(C) states in relevant part as follows:

> (c) Determination of Pension Amount . . .
>
> (2) Lump Sum Form of Payment
>
> (A) Service Pension Cash-Outs. The lump-sum payable to a Window-Eligible Employee who is eligible for a Normal or Early Retirement Service Pension shall equal the Actuarial Equivalent present value (calculated using the assumptions in subsection (c)(2)(C)) of the Service Pension otherwise payable to the Participant in the Normal Form commencing on his Annuity Starting Date . . . .
>
> (C) Actuarial Equivalent. The following assumptions shall apply for purposes of determining the Actuarial Equivalent present value of a Window-Eligible Employee's pension pursuant to this subsection(c)(2): . . .
>
> If the Actuarial Equivalent present value of the pension using the "applicable interest rate" (as defined in (c) does not

> exceed $25,000, the applicable interest rate. . . . *If the Acturarial Equivalent present value of the pension using the "applicable interest rate" (as defined in (c)) does exceed $25,000, 120% of the applicable interest rate*, except that the resulting present value shall not be less than $25,000.

VZ 134 (emphasis added).

Plaintiff argues that § 4.19(c)(2)(C) is not applicable because it applies only to the 1994-1995 cash-out window, which expired on December 30, 1995, one day prior to the cash balance transition. *See* § 4.19(a), VZ 133 ("Each individual who has a vested interest in his Accrued Pension Benefit pursuant to Article VI, who is an Active Participant on his Severance from Service Date which occurs on or after December 31, 1993 and prior to December 31, 1995 (hereinafter "Window-Eligible Employees") and who is not entitled to a lump sum payment under Section 4.7(d) may make the election described in subsection (b) of this Section 4.19."). But as the Committee reasoned, under § 16.5.1(a)(2), the lump-sum cashout value is to be determined under the 1995 BAMPP Plan *as if* Plaintiff had separated on December 31, 1995.

The language of §§ 16.5.1(a)(1) and (a)(2) of the Plan references and incorporates the lump-sum cashout *methodology* prescribed by the BAMPP. An ERISA plan may incorporate terms and provisions from a predecessor plan, including provisions that "expired" before adoption of the current plan. *See Schoenfeld v. Navistar Intern. Transp. Corp. Non-Contributory Retirement Plan*, 1997 WL 49302 (N.D.

Ill. 1997); *See Jones v. UOP, Allied- Signal, Inc.*, 1993 WL 96162 (N.D. Ill. 1993) *rev'd on other grounds*, 16 F.3d 141 (7th Cir. 1994). Thus, the Committee reasonably interpreted § 16.5.1(a)(2) as allowing Plaintiff's lump-sum cashout value to be determined as if § 4.19 still applied to her. Moreover, the BAMPP contained only one methodology for calculating the lump-sum value of a participant's "cash-out" benefit. Between 1991 and the 1995 cash balance transition, Bell Atlantic introduced a series of three lump-sum cashout "windows" for BAMPP participants. VZ 133-35, 130-32, 125-30. During each of these window periods, Bell Atlantic calculated the lump-sum cashout value of a retiring participant's accrued benefit using the 120%/100% PBGC interest rate structure. VZ 134, 131, 129. Later re-statements of the Plan were amended prior to the institution of Plaintiff's claim, to explicitly state that 120% of the applicable PBGC rate is to be used for this type of participant. VZ 56. This further supports the Committee's determination to interpret § 16.5.1(a)(2) as also requiring such a use.

The Court agrees that the Defendants' interpretation was reasonable regardless of whether the formula for the lump-sum cashout value in the 1996 Cash Balance Plan is viewed as unambiguous or ambiguous. When presented with unclear or ambiguous language, the Committee is authorized to interpret the plan language and resolve such ambiguities. Here, the Committee carefully reviewed the provisions, and consulted with relevant documents and staff, and interpreted the plan language accordingly. Although the Committee does have a conflict of interest, its review was thorough and its interpretation was reasonable. Thus, applying the deferential standard of review, the Court upholds the

Committee's decision and finds in favor of Defendants as to the Discount Rate issue.

C. Transition Factor Issue

Plaintiff also argues that the Committee improperly disregarded the second reference to the transition factor in § 16.5.1(a)(2). Plaintiff contends that the language regarding the second reference to the transition factor is not ambiguous, and accordingly, the Committee should not have looked to additional documents to interpret the unambiguous language. Rather, because the Committee concluded the language was a mistake, the language should have been treated as such, and the Committee should have applied to the Court for reformation arising out of a purported scrivener's error. Defendants, however, argue that the Plan language is intrinsically ambiguous, or alternatively, that the objective evidence considered by the Committee is inconsistent with the Plan's language, making the language extrinsically ambiguous. Defendants assert the Committee properly resolved the ambiguity.

The Court agrees with Plaintiff that the language is not intrinsically ambiguous. The language clearly states that the transition factor will be multiplied a second time:

> In the case of a Participant who is not eligible for a Service Pension under the 1995 BAMPP Plan as of the Transition Date, the amount described in this paragraph (2) is *the product of multiplying* (A) the Participant's applicable Transition Factor described in Table 1 of this Section, *times* (B) the lump-sum cashout value

> of the Accrued Benefit payable at age 65 under the 1995 BAMPP Plan, determined as if the Participant had a Severance From Service Date on December 31, 1995, based on Compensation paid through December 31, 1995, *multiplied by the applicable transition factor described in Table 1 of this Section.*

VZ 1100 (emphasis added). Thus, the Court must consider whether the Committee's analysis and determination of the language as extrinsically ambiguous was reasonable.

1. The Committee Improperly Interpreted the Plan Language as Extrinsically Ambiguous.

In its review of Plaintiff's claim, the Committee considered extrinsic evidence, most of which was objective evidence. Although the consultation from the staff members was subjective evidence, the additional plan re-statements, summary documents, and board resolutions were all factual, objective evidence. The extrinsic evidence apparently convinced the Committee that the second reference to multiplying by the transition factor was a drafting mistake, and should not have been included in § 16.5.1(a)(2).

The Committee referenced the earlier and later versions of the plan to support its conclusion that the second reference was a drafting error that should have been omitted. It also observed that all of the documents sent to the employees make no reference to the transition factor being multiplied twice, but rather indicate in several places that the transition factor is only to be multiplied once. For example, the brochure

entitled "Introducing Your Cash Balance Plan" sent to employees shows the opening balance as being determined by the following formula: OLD PLAN LUMP-SUM VALUE X TRANSITION MULTIPLIER = OPENING ACCOUNT BALANCE. The brochure and other estimates sent to employees give examples and explanations of the formulas, and all show the transition factor being multiplied only once.[6]

Plaintiff disputes that evidence of a "mistake" demonstrates an extrinsic ambiguity. Plaintiff argues this language was not a term of art that could be interpreted multiple ways, but rather was language inserted into the contract that could only be interpreted one way. Thus, the Committee should not have interpreted the language as ambiguous, but rather should have treated it as a mistake or scrivener's error and sought to reform the contract in a court of equity.

When faced with language that appears to have been mistakenly included in the plan, courts expect plan administrators to treat the language as a mistake or scrivener's error, rather than a mere ambiguity. *See Grun*, 163 F.3d at 420-21 (unambiguous language not a mutual mistake where mistake was unilateral); *Blackshear v. Reliance Standard Life Ins. Co.*, 509 F.3d 634, 642-45 (4th Cir. 2007) (distinguishing between ambiguities and clerical errors); *Gerlib v. R.R.*

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[6] Plaintiff argues that the actual Plan language should control rather than the plan summary documents, referring to Defendants' disclaimer on those documents stating that employees should look to the actual Plan in the event of any conflict between the plan summary and the Plan. *See* VZ 12931, 13248.

Donnelley & Sons Co., 2002 WL 1285795 (N.D. Ill. 2002) (finding that plan language containing an alleged drafting error was nevertheless unambiguous). Defendants have cited no cases where a court has treated a drafting error as an extrinsic (or intrinsic) ambiguity.

The Seventh Circuit treats the doctrine of mistake and the doctrine of ambiguity as separate and distinct. *See Filipowicz v. Am. Stores Benefit Plans Comm.*, 56 F.3d 807, 814 n.3 (7th Cir. 1995) (stating that "[e]vidence that the written contract did not conform to the parties' intent [would be relevant] for a theory of mutual mistake and a request for reformation" but not for a claim of ambiguity); *Grun*, 163 F.3d at 420-21 (distinguishing between claims of ambiguity and claims of mistake); *NLRB v. Cook County Sch. Bus, Inc.*, 283 F.3d 888, 892-93 (7th Cir. 2002) (differentiating the doctrine of equitable reformation and the "clear and convincing" standard of the doctrine of mistake with regular interpretation of a contract).

Courts in other circuits also apply a different standard for alleged drafting errors in ERISA cases. *See Cent. Pa. Teamsters Pension Fund v. McCormick Dray Line, Inc.*, 85 F.3d 1098, 1104-05 (3d Cir. 1996) (applying the heightened standard of the scrivener's error doctrine and reformation by analyzing whether reformation is appropriate given the statutory goals of ERISA); *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1295 (6th Cir. 1991) (applying the clear and convincing standard in determining whether reformation because of a mistake is appropriate, and distinguishing this standard from ambiguities); *Air Line Pilots Ass'n v. Shuttle, Inc.*, 55 F. Supp. 2d 47, 52 (D.D.C. 1999) (applying the heightened standards of the doctrine of

scrivener's error and equitable reformation rather than the doctrine of ambiguity). The case law carves out a separate doctrine for drafting errors, which requires parties to seek relief in court.

Defendants rely heavily on *Mathews* to support their contention that the plan language is extrinsically ambiguous. The Seventh Circuit in *Mathews* used extrinsic evidence to find that the particular plan language was extrinsically ambiguous. *Mathews*, 144 F.3d at 467-68. The *Mathews* case did not, however, involve an alleged drafting error or "mistake." Rather, the disputed language in *Mathews* was a "term of art," involving a phrase that was also used in the relevant statute and Treasury regulation. *Id.* at 467. The Court considered extrinsic evidence to determine the actual meaning of the phrase "date of distribution," assessing whether that phrase in the plan carried the same meaning as it did in the statute and regulation. *Id.* No party ever alleged that the phrase was not intended to be in the plan, but rather they argued over what the language meant. *Id.* In contrast, the parties in this case do not dispute the meaning of the language, but rather dispute whether the language should actually be in the Plan. The Committee did not find that the language means something different than what Plaintiff asserts; rather, it found that it should simply not be in the Plan, and was included as a result of a drafting error.

Because the Committee found this language to be a mistake, it should have treated it as such, rather than as an ambiguity subject to interpretation by means of extrinsic evidence. The Committee abused its discretion in disregarding the unambiguous language and unilaterally reforming the contract.

2. The Committee Abused Its Discretion When It Improperly Reformed the Contract By Disregarding the Second Reference to the Transition Factor.

Under the so-called "scrivener's error" doctrine[7], "the mistake of a scrivener in drafting a document may be reformed based upon parol evidence, provided the evidence is 'clear, precise, convincing and of the most satisfactory character' that a mistake has occurred and that the mistake does not reflect the intent of the parties." *Gerlib,* 2002 WL 1285795. In determining whether such a reformation is appropriate, one can consider whether the results without reformation would be absurd or create a windfall. *Id.*

In this case, although the Committee did not use the words "reformation," "clear and convincing," "windfall," or "absurd," it appears to have analyzed all of the factors that make up such an analysis. It was convinced the second reference was a mistake, and discussed all of the documents contradicting the second reference. Plaintiff argues that reformation is outside of the Committee's authority, and can only be done by a court of equity.

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[7] Defendants state that under the deferential standard of review, the Court should confine its analysis to whether the term was ambiguous, and reserve any discussion about the scrivener's error defense. However, the Court finds it necessary to address the scrivener's error issue, in part, in its review of the Committee's decision.

a. Seventh Circuit Case Law Regarding ERISA Reformation

The case law in this Circuit places clear limits on the Committee's authority to unilaterally reform the Plan. Under the Plan, the Committee had the power to not only resolve ambiguities, but to also "resolve any other matter under the Plan which is raised by the claimant or identified by the respective committee." 1996 Cash Balance Plan, VZ 1088. Even with this broad discretion, however, the company is bound by the terms of the plan. *Cozzie v. Metro. Life Ins. Co.*, 140 F.3d 1104, 1107-08 (7th Cir. 1998); *See* 29 U.S.C. § 1104(a)(1)(D) ("a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan . . ."). The Seventh Circuit has stated that "[i]nterpretation and modification are different; the power to do the first does not imply the power to do the second." *Cozzie,* 140 F.3d at 1108. Accordingly, although the Committee is given the power to interpret ambiguities in the plan, it is not given the power to modify or reform the plan. *See Swaback v. Am. Info. Technologies Corp.,* 103 F.3d 535, 540 (7th Cir. 1996) (stating that a fiduciary or administrator of an ERISA plan does not have the discretion to "controvert the plain meaning of a plan").

In *Gerlib*, the Court held that an administrator's decision to reform the contract was inappropriate because the result without reformation was not absurd nor would it produce a windfall. *Gerlib,* 2002 WL 1285795. It also found the evidence of the mistake was not clear or convincing. *Id.* The court did not, however, reference any rule of law restricting an administrator's

decision to reform the contract, but only ruled that it was not an appropriate outcome in that case. *Id.*

In *Grun,* the Seventh Circuit held that a mutual mistake did not occur in the drafting of otherwise unambiguous ERISA plan language. *Grun,* 163 F.3d at 421-22. But the Court did not discuss whether it was within the Plan Administrator's authority to conduct such an analysis. *Id.* Rather, it overturned the district court's decision that a mutual mistake had occurred. *Id.*

In *NLRB v. Cook County School Bus, Inc.*, the court agreed with the National Labor Relations Board's decision affirming the ALJ's ruling recommending an order to reform the collective bargaining agreement due to a mutual mistake. *NLRB,* 283 F.3d at 893-896. But unlike the Committee in this case, this Board on its own petitioned the Court to have its order to reform the contract enforced, pursuant to 29 U.S.C. § 160(e). *Id.* at 891.

b. Case Law in Other Circuits Regarding Reformation

The case law in other jurisdictions is clear that an ERISA plan administrator does not have the authority to unilaterally reform the plan agreement, regardless of what the plan language might authorize it to do. For example, the Fourth Circuit in *Blackshear* states that the doctrine of equitable reformation is only to be used in a court of equity. *Blackshear,* 509 F.3d at 642. The court states that when interpreting an ERISA plan, "the administrator cannot simply 'reform' a plan to correct what it unilaterally perceives to be a mistake or error contained in the plan's written terms. Rather,

reformation, like other forms of equitable relief, must be requested by the party seeking to reform the contract granted by the court." *Id.* The court indicated that the district court, in reviewing the administrator's decision under an abuse of discretion standard, did not apply the doctrine of equitable reformation. *Id.* at 643. The court chose not to remand the case to the district court to decide the reformation issue, however, finding on its own that reformation in that case would be inappropriate because evidence of the mistake was not clear and convincing, particularly because the error at issue was also included in the summary plan documents. *Id.* at 643-44 (stating "in this case, the SPD and the plan itself agree; there is utterly no indication of an error or mistake. This case is unlike one where a clerical scrivener's error would be apparent.")

Courts in other circuits have also all stated that equitable reformation is a remedy appropriately granted by a court. *See Ramsey v. Colonial Life Ins. Co. of America,* 12 F.3d 472, 479-80 (5th Cir. 1994) (stating that a court can reform a contract where both parties are mistaken as to a material aspect of the contract); *Audio Fidelity Corp. v. Pension Ben. Guaranty Corp.,* 624 F.2d 513, 518 (4th Cir. 1980) ("a court of equity can reform a contract to correct a mistake"); *Air Line Pilots Ass'n,* 55 F. Supp. 2d at 52 (stating that equitable reformation is a remedy more appropriately granted by a court, rather than being obtained through arbitration). In fact, courts do not take lightly the decision of whether to apply the doctrine of scrivener's error in ERISA cases. For example, the Third Circuit has identified tension between the scrivener's error doctrine and the statutory purposes of ERISA stating "[a] plan document containing a scrivener's error might

mislead an employee into believing he had rights or obligations that he did not, in fact, have." *Cent. Pa. Teamsters Pension Fund*, 85 F.3d at 1104 (quoting *Int'l Union of Electronic, Elec., Salaried, Machine and Furniture Workers, AFL-CIO v. Murata Erie North America, Inc.*, 980 F.2d 889, 907 (3d Cir. 1992)).

c. ERISA Goals and Principles

In determining whether to apply the doctrine of scrivener's error to a particular case, courts often consider the underlying purposes of ERISA, a source which this Court finds instructive. Congress enacted ERISA "'to promote the interests of employees and their beneficiaries in employee benefit plans, and to protect contractually defined benefits.'" *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 830 (2003) (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989); *See generally* 29 U.S.C. §1001. To this end, "ERISA contains certain safeguards and protections which help guarantee the equitable character and the soundness of private pension plans." *Boggs v. Boggs*, 520 U.S. 833, 845 (1997). Under ERISA, "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of: (I) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan . . ." 29 U.S.C. § 1104. One of the primary statutory goals of ERISA is to insure that "every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." *Murata*, 980 F.2d at 907.

ERISA embodies the law of trusts, and therefore courts are guided by principles of trust law when determining appropriate standards of review in ERISA cases. *Firestone,* 489 U.S. at 110, 111. In making such a determination, the Supreme Court has acknowledged that "[a] trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable." *Id.* at 112. But, "[a] trustee who is in doubt as to the interpretation of the instrument can protect himself by obtaining instructions from the court." *Id.* Similarly, recognizing that disputes regarding the interpretation of the plans under ERISA may arise, most benefits plans authorize administrators to resolve these disputes, and the courts defer to the administrators in making their determinations. Although many plans give administrators broad authority to interpret ambiguities that arise out of the plan, courts emphasize the importance of preserving the written plan, and warn administrators against modifying unambiguous language. Just as a trustee is advised to do, a plan administrator "in doubt" should also seek to obtain instructions from the court.

While courts apply a deferential standard of review where the plan grants its administrator broad discretion, the general or default rule for ERISA cases is *de novo* review. *Rush Prudential HMO, Inc. v. Moran,* 526 U.S. 355, 385-86 (2002); *See Firestone,* 489 U.S. at 115 ("a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."); *Herzberger v. Standard Ins. Co.,*

205 F.3d 327, 330 (7th Cir. 2000) (noting that courts particularly favor the application of plenary review where the plan documents create uncertainty regarding the scope of review). Although courts give deference to administrative law judges, agencies, or other courts when reviewing a previous ruling, "crucial differences exist between findings of fact made by a private entity such as a plan administrator and findings made by duly authorized administrative law judges, agencies, or federal district courts." *Ramsey v. Hercules Inc.*, 77 F.3d 199, 205 (7th Cir. 1996). The latter bodies are required to provide claimants with certain procedural protections when making fact findings in their cases, providing claimants with a full and fair hearing, including the opportunity to put on witnesses, cross-examine other witnesses, and argue their case before a judge or body with "acknowledged expertise." *Id.*

In contrast, plan administrators "neither enjoy the acknowledged expertise that justifies deferential review for agency cases . . . nor are they unbiased fact finders like the courts." *Id.; See Brown v. Blue Cross and Blue Shield of Alabama, Inc.*, 898 F.2d 1556, 1564 n.7 (11th Cir. 1990) ("the individuals who occupy the position of ERISA fiduciaries are less well-insulated from outside pressures than are decisionmakers at government agencies."). They also do not provide claimants with similar procedural safeguards such as the ability to make their case in a full hearing with opportunities to interview and cross-examine witnesses. *See Herzberger*, 205 F.3d at 332 ("The Social Security Administration is a public agency that denies benefits only after giving the applicant an opportunity for a full adjudicative hearing before a judicial officer, the administrative law judge. The procedural

safeguards thus accorded, designed to assure a full and fair hearing, are missing from determinations by [ERISA] plan administrators."). Plan administrators are required to give a claimant an opportunity for a "full and fair review," but such review does not carry with it the same procedural protections as that which is afforded to claimants before a court or administrative body. 29 U.S.C. § 1133; *See Crespo,* 294 F. Supp. 2d at 993. Instructively, when an initial decision in "an agency lacks the crucial procedural safeguards, the Administrative Procedure Act requires the federal courts to review both fact and law *de novo.*" *Herzberger,* 205 F.3d at 332. Thus, a rule prohibiting plan administrators from unilaterally reforming a contract where such lack of neutrality and procedural safeguards exists, and allowing only a court to do so by means of a *de novo* review, provides the protections that should be afforded to plan participants under ERISA.

ERISA was created to give employees access to the court system to bring claims arising out of their benefits plan. *See* 29 U.S.C. § 1132 (empowering participants, beneficiaries, and fiduciaries to file a civil action in part to enforce the rights of a participant or beneficiary or to obtain other equitable relief). Accordingly, a dispute regarding whether specific plan language should be modified, language which employees may have relied upon and the modification of which could result in the gain or loss of hundreds of thousands of dollars for an employee, and billions of dollars to a class of employees, is more appropriately reserved for decision by the court. *Firestone,* 489 U.S. at 112. Where unambiguous plan terms afford an employee a benefit, and the plan sponsor asserts that those terms were mistakenly included in the plan, a

court should resolve the dispute. Importantly, multi-employee pension agreements such as this do not involve arm's length negotiations. Rather, they are one-sided agreements where the plan sponsors totally control the drafting of the plan. *See Central States,* 69 F.3d at 1315. Accordingly, a plan sponsor's decision to effectively re-write the contract must be subject to *de novo* judicial review. Such a rule is consistent with the underlying purpose of ERISA.

For these reasons, the Court finds the Committee abused its discretion when upon finding a mistake, it decided to disregard the "mistaken" language and deny Plaintiff's claim. Because of this, and in light of the parties' care to limit this stage of the proceedings to the administrative record, the Court finds that upon determining the language was a mistake, the Committee should have sought to reform the plan document in court. Accordingly, the Court holds the relevant plan language, although possibly a scrivener's error, is unambiguous, and the Committee abused its discretion in rewriting the Plan on its own. If Defendants choose to seek reformation under the theory of mistake or scrivener's error, they are free to move this Court to do so. At this stage of the proceedings, however, the Court finds the Committee's decision to disregard the second reference to the transition factor was an abuse of its discretion.[8]

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[8] Other arguments raised by the parties in their briefs in support of their respective positions, including the issue of judicial estoppel, are not addressed in this opinion because those matters were not raised as part of the administrative record. These arguments are reserved for the second phase of the proceedings in this case.

VI. CONCLUSION

ERISA was created to protect the rights of employees in employee benefits plans. Judicial review of decisions made by plan administrators is an essential component of that protection. The Defendants have a conflict of interest and their decision to deny Plaintiff's claim has been carefully examined by this Court based on the administrative record. Because the plan documents accord the plan administrators broad discretion, this Court has applied an abuse of discretion standard. **Therefore, for the reasons set forth in this opinion, the Court finds that the Committee's interpretation and decision regarding the Discount Rate was reasonable, but that the Committee's decision regarding the Transition Factor was an abuse of its discretion.**

SO ORDERED THIS 28th DAY OF AUGUST, 2008

/s/ Morton Denlow
MORTON DENLOW
UNITED STATES MAGISTRATE JUDGE

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APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Nos. 09-3872 & 09-3965

[Filed September 8, 2010]

Before

WILLIAM J. BAUER, *Circuit Judge*

JOEL M. FLAUM, *Circuit Judge*

JOHN DANIEL TINDER, *Circuit Judge*

CYNTHIA N. YOUNG, on behalf of herself and others similarly situated *Plaintiff-Appellant / Cross-Appellee,*	)
v.	)
VERIZON'S BELL ATLANTIC CASH BALANCE PLAN, et al., *Defendants-Appellees / Cross-Appellants.*	)

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 05 C 07314

Morton Denlow,
Magistrate Judge.

ORDER

On consideration of the petition for rehearing and rehearing en banc, filed on August 24,2010, no judge in active service has requested a vote, and all of the judges on the original panel have voted to DENY the petition for rehearing.

Accordingly, the petition for rehearing is **DENIED**.

APPENDIX E

United States Code Annotated
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program
Subchapter I. Protection of Employee Benefit Rights
Subtitle B. Regulatory Provisions
Part 4. Fiduciary Responsibility

§ 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan

Every employee benefit plan shall--

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Optional features of plan

Any employee benefit plan may provide--

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105(c)(1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or

managers to manage (including the power to acquire and dispose of) any assets of a plan.

CREDIT(S)

(Pub.L. 93-406, Title I, § 402, Sept. 2, 1974, 88 Stat. 875.)

29 U.S.C.A. § 1102, 29 USCA § 1102

Current through P.L. 111-264 (excluding P.L. 111-203, 111-240, 111-257, and 111-259) approved 10-8-10

United States Code Annotated
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program
Subchapter I. Protection of Employee Benefit Rights
Subtitle B. Regulatory Provisions

Part 4. Fiduciary Responsibility
§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)--

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of--

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon--

(A) the earlier of--

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as

not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which--

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if--

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in

the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) Default investment arrangements

(A) In general

For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) Notice requirements

(i) In general

The requirements of this subparagraph are met if each participant or beneficiary--

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) Form of notice

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of Title 26 shall apply with respect to the notices described in this subparagraph.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this

chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement--

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement--

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection--

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

CREDIT(S)

(Pub.L. 93-406, Title I, § 404, Sept. 2, 1974, 88 Stat. 877; Pub.L. 96-364, Title III, § 309, Sept. 26, 1980, 94 Stat. 1296; Pub.L. 101-508, Title XII, § 12002(b)(1), (2)(A), Nov. 5, 1990, 104 Stat. 1388-565, 1388-566; Pub.L. 104-188, Title I, § 1421(d)(2), Aug. 20, 1996, 110 Stat. 1799; Pub.L. 107-16, Title VI, § 657(c)(1), June 7, 2001, 115 Stat. 136; Pub.L. 107-147, Title IV, § 411(t), Mar. 9, 2002, 116 Stat. 51; Pub.L. 109-280, Title VI, §§ 621(a), 624(a), Aug. 17, 2006, 120 Stat. 978, 980; Pub.L. 110-458, Title I, § 106(d), Dec. 23, 2008, 122 Stat. 5107.)

TERMINATION OF AMENDMENTS

<For provisions directing that amendments by Pub.L. 107-16 not apply to years after 2010, see Sunset Provisions set out under this section.>

29 U.S.C.A. § 1104, 29 USCA § 1104

Current through P.L. 111-264 (excluding P.L. 111-203, 111-240, 111-257, and 111-259) approved 10-8-10

United States Code Annotated
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program
Subchapter I. Protection of Employee Benefit Rights
Subtitle B. Regulatory Provisions
Part 5. Administration and Enforcement

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), (8), or (9) of subsection (c) of this section or under subsection (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [FN1] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the

alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts; or

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor--

(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section,

by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if--

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(3) Except as provided in subsections (c)(9) and (a)(6) (with respect to collecting civil penalties under subsection (c)(9)), the Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in

connection with a group health plan (as defined in section 1191b(a)(1) of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title, section 1021(e)(1) of this title or section 1021(f), or section 1025(a) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(1) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person or who fails to meet the requirements of section 1082(d)(12)(E) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 a day for each violation by any person of subsection (j), (k), or (l) of section 101 or section 1144(e)(3) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 1021(g) of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024(a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with subsection (i) or (m) of section 1021 of this title. For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(8) The Secretary may assess against any plan sponsor of a multiemployer plan a civil penalty of not more than $1,100 per day--

(A) for each violation by such sponsor of the requirement under section 1085 of this title to adopt by the deadline established in that section a funding improvement plan or rehabilitation plan with respect to a multiemployer plan which is in endangered or critical status, or

(B) in the case of a plan in endangered status which is not in seriously endangered status, for

failure by the plan to meet the applicable benchmarks under section 1085 of this title by the end of the funding improvement period with respect to the plan.

(9)(A) The Secretary may assess a civil penalty against any employer of up to $100 a day from the date of the employer's failure to meet the notice requirement of section 1181(f)(3)(B)(i)(I) of this title. For purposes of this subparagraph, each violation with respect to any single employee shall be treated as a separate violation.

(B) The Secretary may assess a civil penalty against any plan administrator of up to $100 a day from the date of the plan administrator's failure to timely provide to any State the information required to be disclosed under section 1181(f)(3)(B)(ii) of this title. For purposes of this subparagraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(10) [FN2] Secretarial enforcement authority relating to use of genetic information

(A) General rule

The Secretary may impose a penalty against any plan sponsor of a group health plan, or any health insurance issuer offering health insurance coverage in connection with the plan, for any failure by such sponsor or issuer to meet the requirements of subsection (a)(1)(F), (b)(3), (c), or (d) of section 1182 of this title or section

1181 or 1182(b)(1) of this title with respect to genetic information, in connection with the plan.

(B) Amount

(i) In general

The amount of the penalty imposed by subparagraph (A) shall be $100 for each day in the noncompliance period with respect to each participant or beneficiary to whom such failure relates.

(ii) Noncompliance period

For purposes of this paragraph, the term "noncompliance period" means, with respect to any failure, the period--

(I) beginning on the date such failure first occurs; and

(II) ending on the date the failure is corrected.

(C) Minimum penalties where failure discovered

Notwithstanding clauses (i) and (ii) of subparagraph (D):

(i) In general

In the case of 1 or more failures with respect to a participant or beneficiary--

(I) which are not corrected before the date on which the plan receives a notice from the Secretary of such violation; and

(II) which occurred or continued during the period involved;

the amount of penalty imposed by subparagraph (A) by reason of such failures with respect to such participant or beneficiary shall not be less than $2,500.

(ii) Higher minimum penalty where violations are more than de minimis

To the extent violations for which any person is liable under this paragraph for any year are more than de minimis, clause (i) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(D) Limitations

(i) Penalty not to apply where failure not discovered exercising reasonable diligence

No penalty shall be imposed by subparagraph (A) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such penalty did not know, and exercising reasonable diligence would not have known, that such failure existed.

(ii) Penalty not to apply to failures corrected within certain periods

No penalty shall be imposed by subparagraph (A) on any failure if--

(I) such failure was due to reasonable cause and not to willful neglect; and

(II) such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such penalty knew, or exercising reasonable diligence would have known, that such failure existed.

(iii) Overall limitation for unintentional failures

In the case of failures which are due to reasonable cause and not to willful neglect, the penalty imposed by subparagraph (A) for failures shall not exceed the amount equal to the lesser of--

(I) 10 percent of the aggregate amount paid or incurred by the plan sponsor (or predecessor plan sponsor) during the preceding taxable year for group health plans; or

(II) $500,000.

(E) Waiver by Secretary

In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the penalty imposed by subparagraph (A) to the extent that the payment of such penalty would be excessive relative to the failure involved.

(F) Definitions

Terms used in this paragraph which are defined in section 1191b of this title shall have the meanings provided such terms in such section.

(10) [FN2] The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) of Title 42.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan --

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if

the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of--

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)--

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that--

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

CREDIT(S)

(Pub.L. 93-406, Title I, § 502, Sept. 2, 1974, 88 Stat. 891; Pub.L. 96-364, Title III, § 306(b), Sept. 26, 1980, 94 Stat. 1295; Pub.L. 99-272, Title X, § 10002(b), Apr. 7, 1986, 100 Stat. 231; Pub.L. 100-203, Title IX, §§ 9342(c), 9344, Dec. 22, 1987, 101 Stat. 1330-372, 1330-373; Pub.L. 101-239, Title II, § 2101(a), (b), Title VII, §§ 7881(b)(5)(B), (j)(2), (3), 7891(a)(1), 7894(f)(1), Dec. 19, 1989, 103 Stat. 2123, 2438, 2442, 2445, 2450; Pub.L. 101-508, Title XII, § 12012(d)(2), Nov. 5, 1990,

104 Stat.1388-573; Pub.L. 103-66, Title IV, § 4301(c)(1) to (3), Aug. 10, 1993, 107 Stat. 3767; Pub.L. 103-401, §§ 2, 3, Oct. 22, 1994, 108 Stat. 4172; Pub.L. 103-465, Title VII, § 761(a)(9)(B)(ii), Dec. 8, 1994, 108 Stat. 5033; Pub.L. 104-191, Title I, § 101(b), (e)(2), Aug. 21, 1996, 110 Stat. 1951, 1952; Pub.L. 104-204, Title VI, § 603(b)(3)(E), Sept. 26, 1996, 110 Stat. 2938; Pub.L. 105-34, Title XV, § 1503(c)(2)(B), (d)(7), Aug. 5, 1997, 111 Stat. 1062; Pub.L 107-204, Title III, § 306(b)(3), July 30, 2002, 116 Stat. 783; Pub.L. 108-218, Title I, §§ 102(d), 103(b), 104(a)(2), Apr. 10, 2004, 118 Stat. 602, 603, 606; Pub.L. 109-280, Title I, § 103(b)(2), Title II, § 202(b), (c), Title V, §§ 502(a)(2), (b)(2), 507(b), 508(a)(2)(C), Title IX, § 902(f)(2), Aug. 17, 2006, 120 Stat. 816, 884, 885, 940, 941, 949, 951, 1039; Pub.L. 110-233, Title I, § 101(e), May 21, 2008, 122 Stat. 886; Pub.L. 110-458, Title I, §§ 101(c)(1)(H), 102(b)(1)(H), (I), Dec. 23, 2008, 122 Stat. 5097, 5101; Pub.L. 111-3, Title III, § 311(b)(1)(E), Feb. 4, 2009, 123 Stat. 70.)

[FN1] So in original. Probably should be "subtitle".

[FN2] So in original. Two pars. (10) have been enacted.

29 U.S.C.A. § 1132, 29 USCA § 1132

Current through P.L. 111-264 (excluding P.L. 111-203, 111-240, 111-257, and 111-259) approved 10-8-10

APPENDIX F

2.1 Defined Terms.
When used in this Plan, the following terms (listed in alphabetical order) shall have the meanings stated in this Section 2.

. . . .

Accrued Benefit

For an individual who is a Re-employed 1995 Terminated Participant, the Participant's *Accrued Benefit* under this Plan shall be administered in two parts, the first of which shall be the benefit which the individual accrued under BAMPP prior to the Transition Date as described in the previous paragraph, subject to the adjustment rules described in Section 3.1.1(a) of this Appendix, and which shall remain expressed as an annuity in the normal form . . . .

. . . .

Participating Employer

means any Bell Atlantic Affiliate that has adopted this Plan with the approval of the Committee. Attached to the Plan as Table 1 of Section 16 is a list of the companies which have at any time been Participating Employers, and the date on which the participation of each such Participating Employer commenced (and, when applicable, ceased).

. . . .

Plan

means the Bell Atlantic Cash Balance Plan, as herein set forth and as it may be amended hereafter.

. . . .

3.1 Eligibility to Participate

. . . .

3.1.1 Employees Hired After Transition Date.
In the case of an Eligible Employee who Employment Commencement Date is after the Transition Date, the Eligible Employee shall become an Active Participant as of the first day of the month coincident with or next following day in which the Employee is first credited with six months of Net Credited Service.

3.1.2 Rehired Employees.
If an individual who was formerly an Employee is rehired as an Eligible Employee . . . .

. . . .

4.5 Interest Credits.

4.5.1 When Credited.
Interest Credits shall be added to a Participant's Cash Balance Account as of the end of each calendar month ending prior to the Participant's Benefit Commencement Date. If a Participant terminates employment on a day

prior to the last day of a month and elects, pursuant to Section 5.1(a), a Benefit Commencement Date that is the day immediately following the day the Participant terminates employment, no additional Interest Credits shall be credited to the Participant's Cash Balance Account after the last day of the preceding month.

. . . .

5.1 Timing of Payment of Benefits.
A Participant's benefit shall be distributed in accordance with the rules of Sections 5.1.1 and 5.1.2, but in no event commencing later than the times prescribed in Sections 5.1.3 and 5.1.4.

5.1.1 Termination of Employment.

. . . .

5.1.2 Time of Payment.

. . . .

. . . .

10.2 Limitations on Plan Mergers.

10.2.1 Post-Merger Benefit Calculations.

. . . .

10.2.2 Asset Allocation Upon Post-Merger Spinoff or Termination.

. . . .

13.7 Vesting.

. . . .

If the Plan ceases to be Top-Heavy in any Plan Year, the vesting provisions of Section 7.1 determined without regard to this Section 13.7 shall apply with respect to subsequent Plan Years subject to Section 10.2(b).

. . . .

16.5.1(a)(2) Not Eligible for Service Pension
In the case of a Participant who is not eligible for a Service Pension under the 1995 BAMPP Plan as of the Transition Date, the amount described in this paragraph (2) is the product of multiplying (A) the Participant's applicable Transition Factor described in Table 1 of this Section, *times* (B) the lump-sum cashout value of the Accrued Benefit payable at age 65 under the 1995 BAMPP Plan, determined as if the Participant had a Severance From Service Date on December 31, 1995, based on Compensation paid through December 31, 1995, multiplied by the applicable transition factor described in Table 1 of this Section. . . .

. . . .

Table 1 of Section 16: Transition Factors (Vested Pension)
For Employees Not Eligible for a Service Pension as of 12/31/95 under the 1995 BAMPP Plan. Rows represent years of age. Columns represent years of Retirement Eligibility Service under the 1995 BAMPP Plan. This table shall be applied using interpolation rules

approved by the Secretary of the Benefits Committee

. . . .

APPENDIX G

about this handbook

. . . .

- *Plan documents:* This handbook is intended as a brief, simplified summary of the compensation programs, benefit plans, and other programs that apply to you as an employee. In the case of each benefit plan, for example, the official plan document will be used to determine precisely how the plan works if there's a difference between this handbook's summary and the official plan document. See the Administration section of this handbook for further information about those plan documents and your legal rights.

. . . .

claims administration and other important information

. . . .

official plan documents determine how benefits work This total compensation handbook describes the benefits, pay, and services offered to you as a Bell Atlantic management employee. These summaries are based on the official plan documents, which could be legal plan documents, insurance contracts, or administrative manuals (as described on the chart at the end of this section). The official plan documents will be used to determine how these benefits work if there's a difference between the description in this handbook and the official plan documents.

The chart later in this section lists the official plan documents for each plan.

. . . .

Bell Atlantic plan information

plan name	*official plan document*	*type of plan*
. . . .		
Bell Atlantic Cash Balance Plan	*Plan text*	*Pension (defined benefit)*